(13)

No. 96-792-CFX
Status: GRANTED

Title: Lynne Kalina, Petitioner
v.
Rodney Fletcher

Docketed:
November 22, 1996

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Duggan,Michael C., Cobb,John W.

Counsel for respondent: Ford,Timothy K.

111996 Mr. Cobb's appli. not on file-above counsel sugg. he's counsel of record

Entry	Date	Note	Proceedings and Orders
1	Nov 18 1996	G	Petition for writ of certiorari filed. (Response due January 22, 1997)
3	Dec 12 1996		Order extending time to file response to petition until January 22, 1997.
7	Dec 17 1996		Brief amici curiae of Thirty-Nine Washington State Counties filed.
5	Jan 22 1997		Brief of respondent Rodney Fletcher in opposition filed.
6	Feb 5 1997		DISTRIBUTED. February 21, 1997 (Page 1)
8	Feb 24 1997		Petition GRANTED. SET FOR ARGUMENT October 7, 1997. **********
10	Mar 28 1997		Order extending time to file brief of petitioner on the merits until April 25, 1997.
11	Apr 11 1997		Joint appendix filed.
12	Apr 23 1997		Brief amici curiae of Thirty-Nine Washington State Counties filed.
17	Apr 23 1997		Brief amici curiae of National District Attorneys' Association, et al. filed.
13	Apr 25 1997		Brief of petitioner Lynne Kalina filed.
14	Apr 25 1997		Brief amici curiae of National Association of Counties, et al. filed.
15	Apr 25 1997		Brief amici curiae of Maryland, et al. filed.
16	Apr 25 1997		Brief amicus curiae of United States filed.
19	May 20 1997		Order extending time to file brief of respondent on the merits until June 13, 1997.
20	Jun 13 1997		Brief of respondent Rodney Fletcher filed.
22	Jun 24 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Jul 9 1997		Reply brief of petitioner Lynne Kalina filed.
24	Jul 28 1997		CIRCULATED.
25	Aug 20 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
26	Sep 2 1997		Record filed.
		*	Original record proceedings United States District Court for the Western District of Washington.
27	Sep 12 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for

2 pp

No. 96-792-CFX

Entry	Date	Note	Proceedings and Orders

divided argument GRANTED.

(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prosecutor who has brought formal criminal charges against a defendant entitled to absolute immunity from 42 U.S.C. § 1983 liability when, pursuant to state statute and court rule, she causes an arrest warrant to issue for the purpose of bringing the defendant before the court to respond to the charges brought; as to which the United States Courts of Appeals are in conflict?

LIST OF PARTIES

The parties to the proceeding below are petitioner Lynne Kalina, a King County Deputy Prosecuting Attorney, who was Defendant-Appellant below, and respondent Rodney Fletcher who was Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed August 22, 1996.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 93 F.3d 653 (9th Cir. 1996) and is reproduced in the Appendix at 1a through 7a. The district court's Minute Order denying summary judgment is reproduced in the Appendix at 8a.

JURISDICTION

The Court of Appeals' decision was filed and judgment entered on August 22, 1996.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

R.C.W. 36.27.020 provides in part:

> The prosecuting attorney shall:
>
> . . .
>
> (6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

The full text of R.C.W. 36.27.020 is reproduced in the appendix at 24a through 26a.

R.C.W. 10.37.010 provides:

> No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state,

[1] App. at 1a.

and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

This statute is reproduced in the appendix at 27a.

COURT RULES INVOLVED

Washington Criminal Rule 2.1 provides in part:

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) *Nature*. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It shall be signed by the prosecuting attorney. . . .

The full text of Washington Criminal Rule 2.1 is set forth in the Appendix at 19a through 20a.

Washington Criminal Rule 2.2 provides in part:

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in R.C.W. 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved

and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

The full text of Washington Criminal Rule 2.2 is set forth in the Appendix at 21a through 23a.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Mr. Fletcher filed his federal lawsuit alleging that Ms. Kalina violated his civil rights when she initiated criminal charges against him and sought an arrest warrant to secure personal jurisdiction.

On November 30, 1992, the Seattle Police Department presented an investigative report on a burglary case to the King County Prosecuting Attorney. The suspect was Mr. Fletcher and Ms. Kalina was the assigned deputy prosecutor.[2]

Ms. Kalina reviewed the written report and determined that the prosecuting attorney's office would bring criminal charges against Mr. Fletcher. As part of her initiation of the prosecution, Ms. Kalina prepared and signed an Information charging Mr. Fletcher with burglary in the second degree, a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail, and a Certification for Determination of Probable Cause. These charging documents were filed with the King County Superior Court on December 14, 1992. On the same day, the Honorable Carmen Otero, King County Superior Court Judge, granted the Motion and ordered that an arrest warrant be issued for Mr. Fletcher.[3]

On September 24, 1993, Mr. Fletcher was arrested and held for prosecution on the burglary charges. A few

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[2] App. at 10a to 11a.

[3] App. at 10a to 18a.

weeks later, the King County Prosecuting Attorney determined that the information upon which it had based its prosecution was erroneous and asked that the charges be dismissed. The trial court granted the motion.

Ms. Kalina's followed Washington State law when she initiated the prosecution against Mr. Fletcher. In Washington State, by statute and court rule, the county prosecutor is permitted to initiate felony criminal charges by grand jury indictment, complaint or information.[4] Most criminal felony charges filed in Washington State courts are initiated by information, rather than by complaint or indictment.

To comply with *Gerstein v. Pugh*, 420 U.S. 103 (1975), the prosecuting attorney also files a certification or affidavit signed by the prosecuting attorney setting forth the essential facts constituting probable cause for charging the defendant. The deputy prosecutor obtains these facts from the police reports and summarizes them in his or her affidavit.[5] If the certification or affidavit establishes probable cause, the court may issue an arrest warrant at the request of the prosecuting attorney.[6] Prosecutors utilize this procedure to comply with Washington State law which imposes a duty on the prosecutor to institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies.[7]

This case arose when Ms. Kalina followed this Washington law and caused an arrest warrant to issue for Mr. Fletcher. In his federal lawsuit, Mr. Fletcher contends, and it was assumed for purposes of summary judgment,

[4] Washington Criminal Rule 2.1, App. at 19a; R.C.W. 10.37.010, App. at 27a.

[5] App. at 17a to 18a.

[6] Washington Criminal Rule 2.2, App. at 21a.

[7] R.C.W. 36.27.020(6), App. at 24a.

that the certification contained facts which Ms. Kalina knew or should have known were inaccurate. Ms. Kalina contends that, regardless of the inaccurate information, she is antitled to absolute prosecutorial immunity because she was clearly acting as an advocate, not as an investigator.

A. The Proceedings Below

1. *The District Court Opinion*

The District Court denied Ms. Kalina's motion for summary judgment by a Minute Order which simply concluded that she was not entitled to absolute prosecutorial immunity.[8]

2. *The Court of Appeals Decision*

Ms. Kalina took an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit pursuant to the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); 28 U.S.C. § 1291. A unanimous three-judge panel of the Court of Appeals, relying on this Court's decisions in *Malley v. Briggs*, 475 U.S. 335 (1986), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), affirmed the District Court and held that a "prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant" regardless of when and how the warrant was sought.[9] In its decision, the Court of Appeals noted that "the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant."[10] The Court of Appeals also recognized that a Tenth Circuit ruling was in accord with the Sixth Circuit.[11] The Court of Appeals declined to follow the Sixth

[8] App. at 8a.

[9] *Fletcher v. Kalina*, 93 F.3d 653, 655; App. at 5a, 6a n.2.

[10] *Id.* at 656; App. at 6a.

[11] *Id.* at 656 n.3; App. at 6a to 7a, n.3.

Circuit because it predated *Buckley* and similarly rejected the Tenth Circuit's reasoning because it predated both *Malley* and *Buckley*.[12]

3. *Post-Decision Proceedings*

On the motion of Petitioner, the Ninth Circuit's mandate has been stayed pending final disposition by the Supreme Court.[13]

REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression for the Court: Whether a prosecuting attorney who has filed formal criminal charges against a defendant, is entitled to absolute immunity for causing an arrest warrant to issue which compels the defendant to appear and respond to the charges filed. The Ninth Circuit observed that its resolution of this issue directly conflicts with decisions from the Sixth and Tenth Circuits.[14] Moreover, the Ninth Circuit failed to address the conflict its decision creates with opinions from the Third and Fourth Circuits, where prosecuting attorneys receive absolute immunity when seeking seizure warrants in civil forfeiture proceedings. Such warrants are directly analogous to arrest warrants.[15] This Court should grant review to resolve these conflicts and clarify the law in this important case.

The Ninth Circuit's decision has negative ramifications for all prosecuting officials practicing within the Ninth Circiut because it chills the responsible exercise of a prosecutor's charging function. Under this Court's precedent,

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[12] *Id.* at 656; App. at 6a to 7a.

[13] App. at 9a.

[14] There is also an apparent conflict with *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993) which reached a result similar to the Ninth Circuit.

[15] *See, Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990).

the prosecutor's decision to file charges and all actions taken in conjunction with that decision have consistently been accorded absolute immunity. The Ninth Circuit's decision jeopardizes the rule of prosecutorial advocacy and immunity; it must be overturned.

I. THE NINTH CIRCUIT'S DENIAL OF ABSOLUTE IMMUNITY CONFLICTS WITH THE DECISIONS OF OTHER APPELLATE COURTS THAT HAVE CONSIDERED THE ISSUE.

The Ninth Circuit ruled that a prosecuting attorney who causes an arrest warrant to issue for a defendant against whom formal criminal charges have been filed is not entitled to absolute immunity. The Sixth Circuit reached precisely the opposite conclusion.[16] In both instances a prosecuting attorney allegedly used false statements to cause an arrest warrant to issue. Under these circumstances, the Sixth Circuit held:

> Even taking as true, as we must for purposes of this appeal, the allegations that the prosecutors knowingly obtained issuance of criminal complaints and arrest warrants against the Josephs based on false, coerced statements elicited from Morrow by the prosecutors and police, we find that such conduct, however reprehensible, would be protected by absolute immunity. The decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in "initiating a prosecution," which is protected under *Imbler*, 424 U.S. at 431, 96 S.Ct. at 995.[17]

This Court denied certiorari.[18]

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[16] *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).

[17] *Id.* at 555.

[18] *Joseph v. Patterson*, 481 U.S. 1023 (1987).

The Tenth Circuit also applied absolute immunity to prosecuting attorneys who requested arrest warrants. The Tenth Circuit reasoned:

> As for the arrest, both before and after *Imbler*, a prosecutor's absolute immunity has extended to his procurement of an arrest warrant. *See, e.g., Martinez v. Chavez*, 574 F.2d 1043 (10th Cir. 1978); *Smart v. Jones*, 530 F.2d 64 (5th Cir.), *cert. denied*, 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168 (1976); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927). . . . To be sure, a prosecutor typically seeks an arrest warrant in an *ex parte* proceeding, in which there is no counterargument by opposing counsel to lessen the danger of prosecutorial misconduct. Nevertheless, we think a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of prosecution" under *Imbler*.[19]

The Ninth Circuit's decision also conflicts with the reasoning of decisions from the Third and Fourth Circuits.[20] These Courts found that a seizure warrant in a civil forfeiture case is analogous to an arrest warrant. The Courts recognized that one of the critical advocatory duties of a prosecuting attorney is to ensure that defendants, or in

[19] *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983).

[20] *See, Schrob v. Catterson, supra*; and *Erlich v. Giuliani, supra*, n.13.

[21] *Schrob v. Catterson, supra*, at 1416.

this context the assets, are physically present at trial.[21] Both circuits grant absolute immunity under these circumstances.

This Court should grant certiorari to resolve the conflicts created by the Ninth Circuit's error and to guide all prosecuting officials as to what protection they can expect when they fulfill their duty to bring charged defendants before the court.[22]

II. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH ESTABLISHED SUPREME COURT JURISPRUDENCE.

Recently this Court reaffirmed the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings and occurring in the course of his/her role as an advocate for the State are entitled to the protection of absolute immunity.[23] The Ninth Circuit's decision in this case violates this basic principle. Pursuant to Washington State law, the prosecuting attorney has an affirmative duty to institute and prosecute proceedings before magistrates for the arrest of persons charged with a felony.[24] Thus, procuring arrest warrants is an advocatory role mandated by Washington statutory law. Moreover, procuring an arrest warrant is a necessary step in preparing for and conducting a successful prosecution.[25] The Ninth Circuit failed to respect the state law

[22] The Ninth Circuit relied, in part, on *Kohl v. Casson*, a 1993 decision from the Eighth Circuit. *Fletcher v. Kalina, supra*, at 655. However, a careful reading of that decision demonstrates that the conduct in question occurred during the investigative preindictment phase of the judicial process and not as part of the initiation and conduct of a criminal prosecution. In any event, the Ninth Circuit's reliance on this decision creates further conflict among the Circuits.

[23] *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

[24] R.C.W. 36.27.020(6), App. at 24a.

[25] As the Sixth and Tenth Circuits recognize, securing the person of the defendant is so intimately associated with the judicial process that it warrants a grant of absolute immunity.

concerning charging, failed to acknowledge the advocacy role of the deputy prosecutor in bringing a defendant to court to answer charges and rejected the functional analysis employed by this Court.

The relevant inquiry under the functional analysis is the "nature" and "function" of a particular act, not the "act itself".[26] Ms. Kalina's act was requesting and receiving from the trial court an arrest warrant against a charged defendant. The Ninth Circuit's opinion disregards the nature and function of that act within the context of the judicial process, under Washington State law. Rather, the Court isolated the act itself and erroneously concluded that, because this Court has held in *Malley v. Briggs*, 475 U.S. 335 (1986), that a police officer who applies for an arrest warrant is not entitled to absolute immunity, absolute immunity is not available to a prosecuting attorney who also applies for an arrest warrant.[27] However, the nature and function of the act in the present case is substantially different than the nature and function of the act performed by the police officer in *Malley*.

In *Malley*, the police officer was operating in Rhode Island, a state which uses a grand jury to initiate criminal prosecutions. The police officer filed a criminal complaint with the prosecuting attorney who then independently determined whether to seek an indictment. This Court distinguished the police officer, who files a criminal complaint and warrant request, from the prosecuting attorney who actually seeks the indictment. This Court noted that

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[26] *Mireles v. Waco*, 502 U.S. 9 (1991). In *Mireles*, this Court granted certiorari and summarily reversed a decision of the Ninth Circuit denying immunity to a judge who allegedly instructed police officers to use excessive force in bringing an attorney to the courtroom.

[27] *Fletcher v. Kalina, supra*, at 655-66 (1996), relying on *Malley v. Briggs*, 475 U.S. 335 (1986).

the police officer's act was further removed from the judicial process and thus, not entitled to absolute immunity.[28] The opinion left little doubt, however, that the act of seeking an indictment is an integral part of the judicial process and that a prosecuting attorney who does so is entitled to absolute immunity for that act and any acts undertaken in conjunction with that decision:

> . . . seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[29]

In Washingon State, the filing of the information is the functional equivalent of seeking an indictment,[30] an act entitled to absolute immunity. The arrest warrant flows from the issuance of the information and demonstration of probable cause, analogous to presentation of evidence to a grand jury and issuance of an indictment. When Ms. Kalina requested an arrest warrant at the time she filed the information, her act was not similar in nature and function to the police officer's request in *Malley*.[31] Clearly, the nature and function of Ms. Kalina's act was to secure

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[28] *Malley v. Briggs*, 475 U.S. 342-343.

[29] *Id.* at 343.

[30] Washington Criminal Rule 2.1, App. at 19a.

[31] Justice Kennedy's dissent in *Buckley* recognized that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions" and that it would not be incongruous for one to receive immunity and the other not. *Buckley v. Fitzsimmons*, 509 U.S. at 289 (Kennedy, J., dissenting). The Ninth Circuit did not consider this possibility and, as a result, came to an erroneous result.

personal jurisdiction over the defendant so that he would appear in court to answer the charges. Trial in absentia is not favored and due process requires that a defendant be present in court in order for the state to continue the prosecution.[82] It was an integral step in the judicial process, unlike the police officer's request in *Malley*. Although the Ninth Circuit superficially acknowledged Supreme Court precedent, its opinion departs from the analysis this Court has traditionally applied to determine the extent of immunity available to prosecuting attorneys.

III. THE NINTH CIRCUIT DECISION WILL NEGATIVELY AFFECT THE ABILITY OF PROSECUTING OFFICIALS WITHIN THE NINTH CIRCUIT TO EFFECTIVELY DISCHARGE THEIR PROSECUTORIAL DUTIES.

The negative reverberations of the Ninth Circuit's decision will be felt, at a minimum, by each of the 39 counties in the State of Washington.[83] Each of those counties is bound by Washington Criminal Rules 2.1 and 2.2 as well as R.C.W. 36.27.020 which place an affirmative duty on prosecuting attorneys to engage in the conduct which the Ninth Circuit has found to be undeserving of the protection of absolute immunity.[84]

Thousands of felony prosecutions take place every year in the State of Washington. Prosecutors' offices run on limited local budgets and are thinly staffed. The pace of case filings is often fast because volume is so high, and

[82] *U.S. v. Gagnon*, 470 U.S. 522 (1985) (per curiam); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

[83] Given the breadth of the Court of Appeals ruling, it is obvious that other prosecuting officials within the Ninth Circuit will face similar problems with this decision. The Ninth Circuit's decision is the first to fail to grant immunity to an act which is part and parcel of the charging function. Consequently, filing charges in the Ninth Circuit is no longer an act which can be undertaken with the fearlessness the *Imbler* Court envisioned.

[84] App. at 21a to 24a.

cases are often filed on a rush basis. Stripping the cloak of immunity from an activity which is so closely related to the prosecuting attorneys' charging function will only serve to undermine the public policy considerations which form the foundation for prosecutorial immunity.[85] The Ninth Circuit has effectively limited prosecuting attorneys' choices as to how they can bring a defendant before the court to answer to the charges brought against him/her and, in the process, has provided a major disincentive to the vigorous and efficient enforcement of the law which should be the hallmark of the office of prosecuting attorney.[86]

The Ninth Circuit's erroneous decision immediately threatens prosecutorial resources in the State of Washington. Theoretically, hundreds of cases filed within the last three years could result in civil litigation simply because no conviction was returned. The only requirement a defendant turned litigant would need to meet would be to allege that the injury occurred as a result of the arrest rather than the prosecution. The Ninth Circuit's opinion has essentially converted what was once a substantial degree of protection for prosecuting attorneys into little more than a pleading rule.

[85] This Court has long expressed the concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his energy and attention from the pressing duty of enforcing the criminal law. *Imbler v. Pachtman*, 424 U.S. 409, 424-425. Thus, suits against prosecutors would devolve into a virtual retrial of the criminal offense in a new forum and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive not to go forward with a close case where an acquittal would likely trigger a suit against him for damages. *Id.*

[86] This Court has consistently adhered to the principle that the Federal Courts should not interfere with state criminal prosecutions. *See, Younger v. Harris*, 401 U.S. 37 (1971); *Moore v. Sims*, 442 U.S. 415 (1979). The Ninth Circuit's decision violates this principle.

While the vast majority of these cases would ultimately be resolved in favor of the prosecutor, the burden of having to conduct discovery and go to trial on each such case will necessarily divert scarce prosecutorial resources from their proper function. The decision below represents a major intrusion into the efforts of the states to prosecute crime and defend the citizens whom they serve.

CONCLUSION

In addressing an important issue of public policy, the Ninth Circuit has departed from the traditional approach adopted by this Court and misapplied this Court's prior holdings, creating a direct conflict with several other appellate courts that have considered the issue. The Ninth Circuit has exposed one of the central actors in the judicial process to the very real prospect of retaliatory litigation for actions taken during the initial phase of her/his statutorily mandated duties. Prosecutors will be unable to freely exercise the independent judgment vital to the efficient administration of the criminal justice process and early participation by prosecutors in that process will be discouraged if this decision is not overruled.

For these reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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November —, 1996

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129
D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,
v.

LYNNE KALINA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
August 7, 1996—Seattle, Washington

Filed August 22, 1996

Before: Eugene A. Wright, Robert R. Beezer and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

OPINION

WRIGHT, Circuit Judge:

We must decide whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity. We hold that, based on *Malley v. Briggs*, 475 U.S. 335, 342 (1986) and the functional analysis test, the prosecutor is not entitled to absolute immunity. We affirm and remand.

BACKGROUND:

In determining immunity, we must accept the plaintiff's allegations as true. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Lynne Kalina, a deputy prosecutor, was assigned to work on a case involving alleged theft of computer equipment from a private school in Seattle. She prepared an application for an arrest warrant and an information charging Rodney Fletcher with second-degree burglary. The warrant application was accompanied by a "Certification for Determination of Probable Cause," a sworn declaration describing the result of the police investigation. Based on this document, which she signed, the court issued an arrest warrant for Fletcher. The burglary charge was eventually dismissed when Fletcher's attorney discovered inaccuracies in the certification.

Fletcher brought a 42 U.S.C. § 1983 claim against Kalina in federal district court alleging civil rights violations. He contends that the certification contained information that Kalina knew or should have known was false. First, it said that Fletcher "has never been associated with the school in any manner and did not have permission

to enter the school or to take any property." Fletcher alleged that he had been hired by the school to install the glass partition on which his prints were found and that he had permission to enter the school. Second, the certification said that an electronics store employee identified Fletcher as the man who attempted to sell him computer equipment from the school. Fletcher contended that police reports indicated that no witness had identified him as a suspect although two were shown photo montages.

Upon a motion for summary judgment, the district court denied Kalina absolute immunity and held that qualified immunity was a question of fact to be determined at trial. This interlocutory appeal followed. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); 28 U.S.C. § 1291. We review de novo. *Jesinger v. Nevada Fed. Cred. Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

ANALYSIS:

Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court first considered absolute immunity for prosecutors. The Court recognized that the prosecutor's job is both difficult and essential. It noted that the "office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict?" *Id.* at 422-24. The Court held that prosecutors were absolutely immune from prosecution for their actions during the initiation of a criminal case and its presentation at trial. The Court described these functions as "intimately associated with the judicial phase of the criminal process." *Id.* at 424.

The Court later explicitly held that when prosecutors perform administrative or investigative, rather than advo-

catory, functions they do not receive absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 494-96 (1991). To determine whether an action is administrative/investigative or advocatory, we apply a "functional" analysis. *See id.* at 486. We look at "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). It follows that, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Since *Imbler*, the Court has addressed prosecutorial immunity in two cases. In *Burns*, 500 U.S. at 487, it held that a prosecutor is absolutely immune for his conduct in presenting evidence at a probable-cause hearing for a search warrant, but is not absolutely immune when giving legal advice to the police on whether they have probable cause to arrest. The Court reasoned that appearing in court and presenting evidence were "clearly" advocatory. *Id.* at 491. It did not believe, however, that advising the police on whether they could hypnotize a witness and whether they had probable cause to arrest was so closely associated with the judicial process that it required absolute immunity. *Id.* at 493. The Court emphasized that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87.

In *Buckley*, 509 U.S. at 273, the Court held that a prosecutor is not absolutely immune when he allegedly fabricates evidence during the investigation by retaining a dubious expert witness. The Court reasoned that, because the prosecutor did not yet have probable cause to arrest at the time he was shopping for an expert witness, the function was investigative, not advocatory.[1] The Court commented that:

[1] The Court also held that the prosecutor's allegedly false statements during a press confeernce were not protected by absolute immunity because the comments had no direct tie to the judicial process and because out-of-court statements to the press were not absolutely immune at common law. *See Buckley*, 509 U.S. at 276-78.

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. (citation omitted).

The Supreme Court has never addressed whether a prosecutor is absolutely immune for conduct in obtaining a search warrant. In *Malley v. Briggs*, 475 U.S. 335, 342 (1986), however, the Court held that a *police officer* who secures an arrest warrant without probable cause cannot assert an absolute immunity defense.

The officer made two arguments, both rejected by the Court. He analogized himself to a complaining witness who files a certification. *Id.* at 340. The Court found this argument unavailing because complaining witnesses were not absolutely immune at common law. *Id.* at 340. The officer next argued that his action was similar to a prosecutor seeking an indictment, a function that merits absolute immunity. The Court also rejected this argument, reasoning that the officer's actions were "further removed from the judicial phase of criminal proceedings. . . ." *Id.* at 342-43.

Relying on *Malley* and *Buckley*, we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant. *See also Kohl v.*

Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) ("the function of seeking an arrest warrant is subject only to qualified immunity, not absolute immunity."). Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*.[2]

Kalina argues that it is "standard practice" in King County for the prosecutor to prepare the certification, but the local rules do not limit who may prepare it. *See* Wash. Superior Ct. Cr. R. 2.2(a). If a police officer or complaining witness had filed the same certification, she or he would not receive absolute immunity. *See Malley*, 475 U.S. at 340-41. To hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis.

We note that the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant. In *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987), the court held that the "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution,' which is protected under *Imbler*."[3] In light of more recent Supreme Court law and

[2] We are not persuaded by Kalina's argument that *Malley* can be distinguished based upon the time the declaration was filed. She argues that Officer Malley filed his declaration early in the case, which made his action investigatory. She contends that her declaration was filed later, making it an advocatory act. In *Malley*, 475 U.S. at 337, the application for an arrest warrant was filed simultaneously with the felony complaint. Here, the application for the arrest warrant was filed with the information. There is little, if any, distinction.

[3] Kalina also relies on *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983)). In *Lerwill*, 712 F.2d at 437, the Tenth Circuit granted a prosecutor absolute immunity because "[i]n seeking a warrant for . . . arrest, [the prosecutor] was acting as an advocate for the

the Eighth Circuit's opinion in *Kohl*, we decline to follow the Sixth Circuit. *Joseph* was issued before the Supreme Court decided *Buckley*, which emphasized that it would be "incongruous" to expose police to potential liability while protecting prosecutors for the same act. Moreover, although decided shortly after *Malley*, the opinion does not consider that case in deciding whether seeking an arrest warrant merits absolute immunity.

Finally, Kalina argues that policy concerns dictate a finding of absolute immunity. Absolute immunity serves a vital public interest by protecting prosecutors from distracting and time-consuming litigation. The Supreme Court, however, has made it clear that qualified immunity is generally sufficient to protect against frivolous lawsuits. The district court explicitly noted that qualified immunity was a question of fact in this case. We emphasize that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has noted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

CONCLUSION:

Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant. We AFFIRM the denial of summary judgment and REMAND for further proceedings.

State before a neutral magistrate." This case, however, predates *Malley*, *Burns* and *Buckley*.

[Filed Oct. 19, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court DENIES defendant's motion for summary judgment, docket no. 12. *Buckley v. Fitzsimmons*, 509 U.S. ——, 125 L.Ed.2d 209, 112 S. Ct. 2606 (1933); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S. Ct. 984 (1976). The Court concludes that defendant is not entitled to absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. ——, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1933); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986). Whether qualified immunity will apply in this case is a question of fact.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 19th day of October, 1995.

BRUCE RIFKIN
Clerk

By /s/ Casey Condon
Deputy Clerk

[Filed. Sep. 18, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129

D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,

v.

LYNNE KALINA,
Defendant-Appellant.

ORDER

Before: WRIGHT, Circuit Judge.

Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HONORABLE THOMAS S. ZILLY

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

AFFIDAVIT OF LYNNE KALINA

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Lynne Kalina, being first duly sworn on oath, deposes and states as follows:

1. I am a Deputy Prosecuting Attorney for King County and have been so employed since October 15, 1990. I have personal knowledge of the matters contained herein and I am competent to testify.

2. In November, 1992, I was assigned to the filing unit within our office. My duties in that position included the review of cases referred by various police agencies for the purpose of determining whether criminal charges should be filed. On November 30, 1992, the Seattle Police Department referred a burglary case to our office in which the suspect was the plaintiff, Rodney Steven Fletcher. I reviewed this case and determined that our office would file criminal charges against Mr. Fletcher.

3. On or about December 7, 1992, I personally prepared an Information charging Mr. Fletcher with Burglary in the Second Degree. A true and correct copy of that Information is attached hereto as exhibit A. On that same date, I also prepared a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail (attached as Exhibit B) and a Certification for Determination of Probable Cause (attached as Exhibit C) which I personally signed.

4. All three of the documents referred to in paragraph 3 above where filed with the King County Superior Court on December 14, 1992. That same day, the Honorable Carmen Otero granted my motion and ordered that an arrest warrant be issued for Mr. Fletcher so that he could be brought before the Court to respond to the charges against him.

5. The filing of the Information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

/s/ Lynne Kalina
LYNNE KALINA

EXHIBIT A

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
Plaintiff,

v.

RODNEY STEVEN FLETCHER,
Defendant.

INFORMATION

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse RODNEY STEVEN FLETCHER of the crime of Burglary in the Second Degree, committed as follows:

That the defendant RODNEY STEVEN FLETCHER in King County, Washington during a period of time intervening between July 26, 1992 through July 27, 1992, did enter and remain unlawfully in a building, located at 3401 Southwest Myrtle Street, Seattle (Our Lady of Guadalupe School), in said county and state, with intent to commit a crime against a person or property therein;

Contrary to RCW 9A.52.030, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

EXHIBIT B

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
Plaintiff,

v.

RODNEY STEVEN FLETCHER,
Defendant.

MOTION AND ORDER DETERMINING THE EXISTENCE OF PROBABLE CAUSE, DIRECTING ISSUANCE OF WARRANT AND FIXING BAIL

The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for the arrest of the defendant, and

( ) fixing the bail of the defendant in the amount of ———, cash or approved surety bond.

(X) directing the release of the defendant, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

In connection with this motion, the plaintiff offers the information on the Suspect Information Report attached to this motion and the affidavit attached to the Information.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #9102
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein hereby determines that probable cause exists to believe that the above-named defendant committed the crime alleged in the Information herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the arrest of the above-named defendant; and

IT IS FURTHER ORDERED that

( ) the bail of the defendant be fixed in the amount of ———, cash or approved surety bond.

(X) the defendant be released, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

IT IS FURTHER ORDERED that the defendant be advised of the amount of bail fixed by the court and/or conditions of his or her release, and of his or her right to request a reduction of bail and to be heard thereon. Service of the warrant by telegraph or teletype is authorized.

DONE IN OPEN COURT this 14 day of December, 1992.

/s/ Carmen Otero
Judge

Presented by:

/s/ Lynne Kalina
LYNNE KALINA,
WSBA #91002
Deputy Prosecuting Attorney

SUSPECT INFORMATION REPORT

CASE NO. 9 2 | 3 3 4 0 5 4

SEATTLE POLICE DEPARTMENT — UNIT 313 — B/TS 92- 276 FILE NO.

DATE OF REPORT	TIME	OFFENSE	B/A NUMBER
11-23-92	1300	BURGLARY	

BOOKING DATE	TIME

NAME (LAST, FIRST, MIDDLE - JR., SR., 1ST, 2ND, 3RD): FLETCHER, Rodney Steven

SEX: male — RACE: white

DATE OF BIRTH	STATE OR PROVINCE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SKIN TONE
092760	Minnesota	6-2	190	bln	blue	med

SCARS, MARKS, TATTOOS, ARTIFICIAL BODY PARTS, ETC.	CAUTION - ARMED, DANGEROUS	STATEMENT TAKEN?	OWN REAL PROPERTY?
	No	No	Unk

LAST KNOWN ADDRESS - CITY, STATE, ZIP	TELEPHONE NUMBER	DRIVER LICENSE NUMBER
24823 21st Ave S. Kent		FLETCRS40207

STATE	EXPIRES	SOCIAL SECURITY NUMBER	LOCAL NUMBER	FBI NUMBER	STATE ID NUMBER
XXX WA	92			583044W8	

FINGERPRINT CLASSIFICATION	ALIAS NAME(S)	VEH. LIC. NO.	STATE	EXP.

VEHICLE I.D. NO.	YEAR	MAKE	MODEL	STYLE	COLOR(S)

OCCUPATION	BUSINESS ADDRESS OR SCHOOL (COMPANY NAME - ADDRESS - DEPARTMENT OR SHOP NO. AND PHONE)
Laborer	Unk

MARITAL STATUS - CHILDREN (NO.)	LIVING WITH	TIME IN COUNTY	UNION AND LOCAL NUMBER
Unk			

INVESTIGATING OFFICER	SERIAL	UNIT	PHONE	APPROVING OFFICER
Det G K Ruedebusch	2734	313	386-1875	3537

CRIMINAL RECORD (CONVICTIONS)	ACTIVE PROBATION OR PAROLE — PROBATION OFFICER, PHONE — ☐ YES ☐ NO	NAME(S) OF ACCOMPLICE(S)
None		

ARRESTING AGENCY AFFIDAVIT

(CONCISELY SET FORTH FACTS SHOWING PROBABLE CAUSE FOR EACH ELEMENT OF THE OFFENSE AND THAT THE SUSPECT COMMITTED THE OFFENSE. IF NOT PROVIDED, THE SUSPECT WILL BE AUTOMATICALLY RELEASED. INDICATE ANY WEAPON INVOLVED).

On 7-26-92 between 1400 hrs and0650 hrs on 7-27-92 susp went to Our Lady of Guadalupe school, located at 3401 SW Myrtle St, Seattle, WA. Susp broke into VB and stole a computer, two printers and a modem. Susp's finger prints were I.D. inside VB in a location that could only be put there by the susp. Susp did not have permissinn to enter or remove anything from VB.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11-23-92 SPD — DATE AND PLACE

Det G. Ruedebusch spd — SIGNATURE/AGENCY

1

LAW ENFORCEMENT POSITION ON RELEASE:
WOULD SAFETY OF INDIVIDUAL OR PUBLIC BE THREATENED IF SUSPECT RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY - BE SPECIFIC)? ANY OTHER REASONS WHY SUSPECT SHOULD NOT BE RELEASED (CONSIDER PRIOR FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY - BE SPECIFIC).

NONE

2

ANTICIPATED DATE OF REFERRAL:	ANTICIPATED CHARGE:
11-24-92	BURGLARY

PRELIMINARY APPEARANCE INFORMATION — DATE:	JUDGE:	BOND POSTED — DATE: AMOUNT:$ CO:
P.D.: YES ☐ NO ☐	CONDITIONS:	

RETURN DATE:	RETURNED: YES ☐ NO ☐ / EXCUSED: YES ☐ NO ☐	NOT RELEASED ☐	BOND SET:$

EXHIBIT C

CAUSE NO. 92-1-07863-1

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Lynne Kalina is a Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054;

That this case contains the following upon which this motion for the determination of probable cause is made.

Our Lady of Guadalupe School is located at 3401 Southwest Myrtle Street, Seattle, King County, Washington, George Christman is the custodian of the school. On July 27, 1992, at 6:50, Christman discovered that sometime during the previous night, the kitchen window had been pried open in a manner which would allow entry into the school. Christman called the police.

Investigation showed that the burglar had cut a hole in a plexiglass kitchen window, reached in, and pried open the window. The burglar had ripped out a restrictive bar to allow the window to open fully. Once inside the building, the burglar had searched through cabinets and forced open several doors. The burglar forced open a Coke machine, taking about $2 in change. The burglar had climbed over a glass partition into the school office and had taken a computer, two printers, and a modem. The burglar exited out of the office door.

Seattle Police Department Officer Burton was able to lift fresh latent prints from the partition and from a paper clip box which had been emptied. Seattle Police Department Identification Technician Holshue positively identified several prints lifted as Rodney Fletcher's prints. The defendant, Rodney Fletcher, has never been asso-

ciated with the school in any manner and did not have permission to enter the school or to take any property.

On July 27, 1992, at 2:30 p.m., the defendant entered Empire Electronics and contacted employee Lance Brandon. The defendant asked Brandon to give an appraisal on a computer which was in his car. Brandon went to a car which was occupied by Jerry Ward. Brandon told the defendant that the computer was worth about $200, but wanted to see if the computer was in working order before buying it. The defendant brought the computer into the store.

Brandon noticed that the computer's serial number had been removed. Brandon told the defendant that he needed the serial number, so the defendant left the store to retrieve the serial number. Brandon worked with the computer while the defendant was absent and noticed information on the hard drive indicating that the computer belonged to Our Lady of Guadalupe School.

Brandon called the police, but before the police arrived, the defendant and Ward returned to the store. Brandon told the defendant that he could not buy the computer because the defendant did not have any identification. The defendant took the computer and left the store. Brandon later identified the defendant from a photo montage.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 7 day of December, 1992, at Seattle, Washington.

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) *Nature.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) *Contents.* The indictment or the information shall contain or have attached to it the following information when filed with the court:

(i) the name, address, date of birth, and sex of the defendant;

(ii) all known personal identification numbers for the defendant, including the Washington driver's operating license (DOL) number, the state criminal identification (SID) number, the state criminal process control number (PCN), the JUVIS control num-

ber, and the Washington Department of Corrections (DOC) number.

(b) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(c) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(e) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the prosecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986; March 18, 1994.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

(b) Issuance of Summons in Lieu of Warrant.

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue.* If the indictment or information charges only the commission of a misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons.* A summons shall be in writing and in the name of the State of Washington, shall be signed by

the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is

brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall, on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

[Amended effective September 1, 1983; September 1, 1986; September 1, 1995.]

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all costs bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assesor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commisioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.

(3)

No. 96-792

In The
Supreme Court of the United States
October Term, 1996

LYNNE KALINA,
Petitioner,
v.
RODNEY FLETCHER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

*TIMOTHY K. FORD
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QUESTION PRESENTED

Under the analysis dictated by this Court's precedents, which focuses on "the nature of the function performed, not the identity of the actor who performed it," Forrester v. White, 484 U.S. 219, 229 (1988), is a prosecutor who acts as the complaining witness on an arrest warrant application entitled to absolute, rather than qualified, immunity from suit under 42 U.S.C. § 1983?

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COUNTERSTATEMENT OF THE CASE

The statement of the case in the Petition begins by mischaracterizing the allegations in Respondent's lawsuit. Those allegations were clearly set forth in his Complaint, a copy of which is attached as Appendix A to this Brief.

As the Complaint shows, contrary to Petitioner's assertion, Respondent Rodney Fletcher has never alleged "that Ms. Kalina violated his civil rights when she initiated criminal charges against him and sought an arrest warrant to secure personal jurisdiction." Pet. 3. Mr. Fletcher's allegation has always been limited to Ms. Kalina's separate and distinct action in "prepar[ing] and fil[ing] a Certification for Determination of Probable Cause." Complaint, App. A2. It was in that role of a complaining witness that the Complaint alleged "defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her

certification would result in Mr. Fletcher's arrest and prosecution." Ibid.

A. Respondent's Arrest.

In the summary judgment motion from which the appeal below was taken, Petitioner did not contest the facts set forth in the Complaint. The Complaint alleged that in early 1992 Respondent Rodney Fletcher was hired to do construction work inside the Our Lady of Guadalupe School in Seattle, Washington. App. A-3. After the school was burglarized in July of that year, Seattle police unsurprisingly found a fingerprint inside which matched Mr. Fletcher's. A police report regarding the fingerprint match was forwarded to the King County Prosecuting Attorney's office, and thence to Petitioner Lynne Kalina, in its filing unit. Pet. App. 10a, 16a.

Ms. Kalina decided to file criminal charges against Mr. Fletcher. Ibid. Ms. Kalina did this by preparing and signing the only document necessary to initiate a felony

prosecution in the State of Washington, a criminal Information.[1] In addition, for reasons not yet explained, Ms. Kalina sought to have Mr. Fletcher arrested, rather than utilizing the summons procedure provided for in Washington Criminal Rule 2.2(b).[2] Toward that end, she prepared a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail. Pet. App. 13a-14a. Attached to the Motion was a copy of one of the police reports, which said in conclusory

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[1]The statement of facts in the Petition refers to the Motion for an Arrest Warrant, and its supporting certification, as "charging documents" which Ms. Kalina prepared "[a]s part of her initiation of the prosecution...." Pet. 3. These characterizations are inaccurate under Washington law, which provides that "[n]o pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceeding in any court of the state...." RCW 10.37.010.

[2]The full text of the current version of this Rule, which is only partly set out in the body of the Petition, appears at Pet. App. 21a through 23a. The Rule was formally amended in 1995, in a manner that is not material to any of the issues here; for the Courts' information, the full text of the Rule as it appeared in 1992 is set out in Appendix B to this Brief.

terms that Mr. Fletcher was suspected of the crime because of the location of his fingerprint. Pet. App. 16a.[3]

Rather than rely on that sworn police report Ms. Kalina prepared her own "Certification for Determination of Probable Cause" in support of the Motion. Pet. App. 17a. In that document, she took on a distinct role: the role of a "complainant" or "witness" providing "an affidavit ... or sworn testimony establishing the grounds for issuing the [arrest] warrant." See Wash. CrR 2.2(a); App. B1; Pet. 3.

Ms. Kalina's declaration contained two statements that were patently false and unsupported by the police reports she had been provided. One was the assertion that "Rodney Fletcher ... has never been associated with the

[3]The arrangement of Exhibit B to the Petition does not correspond exactly to the form of the documents as they were submitted below. There was no break between the Motion and Order; they constituted a single two-page document, to which the police report (Pet. App. 16a) was attached.

school in any manner and did not have permission to enter the school or to take any property." Pet. App. 17a-18a. The other was that a witness had picked a photograph of Mr. Fletcher from a photo montage, identifying him as a person who was in possession of the school's computer. Pet. App. 18a. In fact, the police reports provided Ms. Kalina stated clearly that the witnesses who were shown montages including Mr. Fletcher's photograph did not identify him as the suspect. App. A-3.

On the basis of Ms. Kalina's declaration, a warrant was issued for Mr. Fletcher's arrest, and he was later arrested and jailed. When his retained counsel discovered Ms. Kalina's testimonial errors, the charges against him were dismissed. App. A-4.

B. The Proceedings Below.

Mr. Fletcher subsequently brought this action pursuant to 42 U.S.C. § 1983, claiming that Ms. Kalina had caused him to be subjected to a violation of his federal constitutional rights by making the false statements in her certification. App. A2. Before any discovery was had, Ms. Kalina moved to dismiss, claiming that her actions in preparing the Certification were covered by absolute prosecutorial immunity.

The District Court denied Ms. Kalina's motion, holding her actions were not covered by absolute immunity and reserving decision on the fact-based issue of qualified immunity. Pet. App. 8a. Ms. Kalina appealed interlocutorily, and the Court of Appeals unanimously affirmed, holding she was "not immune for her actions in filing a declaration for an arrest warrant." Pet. App. 7a.

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW CORRECTLY HELD THAT A PROSECUTOR WHO ACTS AS A COMPLAINING WITNESS PERFORMS A FUNCTION OUTSIDE THE SCOPE OF HER ABSOLUTE IMMUNITY.

The scope of absolute immunity under § 1983 depends on "the nature of the function performed, not the identity of the actor who performed it." Forrester v. White, 484 U.S. 219, 229 (1988). The focus of the decisions below was, therefore, properly "the nature of the function performed" by Petitioner Kalina that gave rise to this lawsuit. See Pet. App. 4a.

Ms. Kalina performed more than one function with respect to Rodney Fletcher's prosecution and arrest.[4] One of those functions was clearly prosecutorial: preparing and signing the Information by which Mr. Fletcher was

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[4] A prosecutor may perform more than one function in a single case, some of them covered by qualified immunity and others not. Burns v. Reed, 500 U.S. 478, 492 (1991).

charged. See Imbler v. Pachtman, 424 U.S. 409, 431 (1996). That was not the function for which Mr. Fletcher sued her, however. Mr. Fletcher's Complaint against Ms. Kalina charged her with misconduct in the performance of a separate and distinct function which was not "prosecutorial" at all: acting as a complaining witness on a declaration offered to establish probable cause for Mr. Fletcher's arrest. See App. A2-A4.

The decision below distinguished this function, which could as easily have been performed by "a police officer or complaining witness" (Pet. App. 6a), from the "advocatory" functions that are exclusively the province of prosecutors and therefore protected by the bar of their absolute immunity. Pet. App. 3a-4a. Petitioner's attack on that decision clouds that distinction. If that distinction is kept clear, there is no conflict at all between the decision below and this Court's precedents; indeed, those precedents dictated the result below. Nor is there any division among

the lower courts; nor will the decision below hamper prosecutors in any significant way. There is therefore nothing in this case that calls for this Court's review.

A. It Is Not a Prosecutorial Function to Act As A Witness Whose Testimony Is Used To Establish Probable Cause.

The Petition characterizes the conduct for which Ms. Kalina was sued as a "part and parcel" of her "prosecutor's charging function." Pet. App. 6, 12 n.33. That characterization has no basis in the law of the State of Washington.

Washington law permits prosecutors to initiate felony prosecutions simply by filing an Information. RCW 10.37.015. In fact, where the Information procedure is utilized, a Washington statute provides specifically that no other pleading is required to bring a felony charge. RCW 10.37.010. Washington law neither requires, nor explicitly permits, prosecutors to sign or submit the kind of

"Certification for Determination of Probable Cause" filed by Ms. Kalina in this case.

The only Washington statute or court rule authorizing Ms. Kalina's "Certification" was Washington Criminal Rule (CrR) 2.2. That Rule provides that when felony charges are filed, whether by indictment or information, a "court may direct the clerk to issue a warrant for the arrest of the defendant ...." Wash. CrR 2.2(a); App. B1; see Pet. 2. Alternatively, the same Rule permits the court to have the defendant served with a summons, thereby obtaining jurisdiction without an arrest. Wash. CrR 2.2(b)(1); Pet. App. 21a.[5] In order to issue an

[5]The availability of this summons procedure belies Petitioner's argument that obtaining an arrest warrant is "an integral step in the judicial process," because "due process requires that a defendant be present in court...." Pet. 12. A defendant's presence can be obtained by summons as well as by arrest. A summons directing a defendant to appear and answer a criminal charge requires no showing of probable cause, Wash. CrR 2.2(b), and implicates no constitutional right. Albright v. Oliver, 510 U.S. 266 (1994).

(continued...)

arrest warrant, the Rule provides that the court must first find "probable cause based on an affidavit, ... or sworn testimony ...." Wash. CrR 2.2(a). The Rule refers to the persons who provide this evidence as "complainant[s]" and "witnesses". Ibid. It says nothing about Prosecuting Attorneys.

Contrary to Petitioner's claim, nothing in Washington law imposes on prosecutors the "duty" to act as complaining witnesses when they seek arrest warrants. Pet. 4. RCW 36.27.020(6) requires Prosecuting Attorneys to "[i]nstitute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably

[5](...continued)
Moreover, even if it were true that Mr. Fletcher's physical arrest was a necessary prerequisite to his prosecution, that cannot mean that every action taken toward that end is prosecutorial. If Ms. Kalina had herself physically performed the arrest, surely she would not be immune simply because she happened to be the deputy prosecuting attorney simultaneously prosecuting the case. No more should her immunity extend to the separate function of complaining witness.

suspected of felonies," not to be the witnesses in those proceedings. As should be evident from its lack of citations to authority, Respondent's explanation of the role of the "certification or affidavit signed by the prosecuting attorney" (Pet. 4) describes a common practice, not a legal function.[6]

As the decision below observed, the certification filed by Ms. Kalina could have just as easily have been signed by "a police officer or complaining witness ...." Pet. App. 6a. Under Washington law, any citizen can be a complaining witness. 13 Ferguson, Washington Criminal Practice and Procedure § 2745 at 39 (1984).[7] Ironically,

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[6]We do not deny that many Washington prosecutors swear out probable cause affidavits, like Ms. Kalina did. The commonness of the practice accounts for the numerous occasions on which Washington appellate courts have found certificates relevant to other sorts of issues. See Brief of Petitioner's Amici at 3-4.

[7]Every application for an arrest warrant is, in a sense, the "first step" in a judicial proceeding. A person taken into custody pursuant to any arrest warrant must be (continued...)

Ms. Kalina's Motion was supported by a sworn police report which met the formal requirements of the Rule; but that police report did not make out probable cause, because (unlike Ms. Kalina's certification) it adhered to the facts.

The nature of the "conduct" at issue here--swearing to facts as a complaining witness--does not change according to the witness' official title (or lack thereof). The decisions below correctly so held.

B. This Court Has Held That A Witness Whose Testimony Is Used To Establish Probable Cause Is Protected Only By Qualified Immunity.

Although § 1983 establishes no immunities on the face of the statute, this Court has read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them." Imbler v. Pachtman, 424 U.S.

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[7](...continued)
taken to superior court as soon as practicable after the detention is commenced. See Wash. CrR 3.2B(a)(1)(i); Wash. CrRLJ 3.2.1; County of Riverside v. McLaughlin, 508 U.S. 44 (1991).

409, 418 (1976). The initial inquiry is whether an official claiming immunity under § 1983 can point to some common-law counterpart to the privilege he asserts. "For executive officers in general ... qualified immunity represents the norm." Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982). The defendant official in a § 1983 action bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871, the time of the enactment of § 1983. Buckley v. Fitzsimmons, 509 U.S. 259, 267 (1993). "Thus, if application of the principle is unclear, the defendant simply loses." Id. at 281 (Scalia, J., concurring).

> The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. We have been quite sparing in our recognition of absolute immunity, and have refused to extend it any further than its justification would warrant.

Burns v. Reed, 500 U.S. at 486-87 (internal quotation marks and citations omitted).

"In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." Malley v. Briggs, 475 U.S. 335, 340-41 (1986). At common law, absolute immunity was not enjoyed by "complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action." Wyatt v. Cole, 504 U.S. 158, 164-65 (1992).

A law enforcement officer has only qualified immunity for his or her actions in applying for an arrest warrant. Malley v. Briggs, 475 U.S. at 342. The functional test of Imbler and its progeny thus mandate that only qualified immunity protects a prosecutor who takes on that very same role. It would be incongruous to grant absolute immunity to a deputy prosecutor who chooses to act as a complaining witness, but to deny such immunity to a police officer performing exactly the same function. See

Burns v. Reed, 500 U.S. at 495 (denying absolute immunity to prosecutor performing function for which police officers receive only qualified immunity); Buckley v. Fitzsimmons, 509 U.S. at 273. ("[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor.... When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.")

This Court has thus reserved absolute immunity for purely prosecutorial functions, such as "initiating a prosecution and in presenting the State's case," Imbler v. Pachtman, 424 U.S. at 431 (1976), or presenting of testimony by law enforcement officers during a hearing on an application for a search warrant, Burns v. Reed, 500 U.S. at 491. "Those actions clearly involve the prosecutor's role as advocate for the State, ..." Ibid.

"[I]t is the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] [the Court's] immunity analysis." Id. at 506 (Scalia, J., concurring in part and dissenting in part). The "function performed" by Ms. Kalina was exactly the same as "the function performed" by the defendant officer in Malley v. Briggs. She personally vouched, under oath, for "facts" offered to a judicial officer in support of the arrest warrant application, which was submitted along with a criminal complaint. See Malley v. Briggs, 475 U.S. at 338. This Court rejected the officer's claim of absolute immunity in Malley, finding no common-law tradition of absolute immunity for an official whose complaint causes a warrant to issue. Malley, 475 U.S. at 342. The Court said that, since § 1983 "on its face does not provide for any immunities, we would be going far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." Ibid. (emphasis added)

Because of that, and because "[c]omplaining witnesses were not absolutely immune at common law," Malley, 475 U.S. at 340-41, the courts below had no alternative but to rule as they did.

C. The Lower Federal Courts Have Not Extended Absolute Immunity To Prosecutors Who Act As Complaining Witnesses.

There is no division among the circuits on the narrow question presented here. Only one other reported post-Imbler case appears to have directly addressed it. Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993). In Kohl, the Eighth Circuit said that a prosecutor is absolutely immune for appearing before a judicial officer to present evidence or argue the law in support of an arrest warrant, because those functions "involve judicial acts and are intimately related to the judicial phase of the criminal process." 5 F.3d at 1146. However, like the courts below, Kohl held that a prosecutor does not have absolute immunity if he or

she chooses to act as a witness in support of an application for an arrest warrant.

> [W]here the prosecutor switches functions from presenting the testimony of others to vouching, of his own accord, for the truth of the affidavit presented to the judicial officer, the prosecutor loses the protection of absolute immunity and enjoys only qualified immunity, just as the police officer was held to have in Malley [v. Briggs].

Kohl, 5 F.3d at 1146.

None of the cases cited by Petitioner address this issue, because none of them involved allegations that a prosecutor had acted as the complaining witness on a warrant application. In Joseph v. Patterson, 795 F.2d 549 (6th Cir. 1986), the allegation was "that the prosecutors knowingly obtained issuance of criminal complaints and arrest warrants against the Josephs based on false, coerced statements elicited from Morrow by the prosecutors and police...." 795 F.2d at 555 (emphasis added). The court found the defendants protected by absolute immunity from

that claim, because "[t]he decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution,' which is protected under Imbler...." Ibid. (emphasis added). On a separate claim, arising (much like the claim in this case) from "[t]he preparation of an application for [a] ... search warrant," the court in Joseph did not extend absolute immunity, but found "a factual inquiry is necessary in order to determine the role in which this challenged activity was conducted." 795 F.2d at 556.

In Lerwill v. Joslin, 712 F.2d 435 (10th Cir. 1983), the legal and constitutional basis of the plaintiff's claim was unclear, even to the Court of Appeals. See 712 F.2d at 436 n.1. However, there is no indication that the gravamen of the complaint was that the prosecutor had himself made false statements in seeking an arrest warrant. Instead, the Lerwills' complaint appeared to be simply that the part-time city attorney had acted beyond his authority

in "present[ing]" a felony complaint to a justice of the peace, and "request[ing]" an arrest warrant. 712 F.2d at 436. Thus, the Court in Lerwill held the defendant city attorney was immune for "seeking a warrant for the Lerwills' arrest," "acting as an advocate for the State," "present[ing] ... arguments to a justice of the peace," and "seeking a warrant for the arrest of a defendant against whom he has filed charges...." 712 F.2d at 437-38. The Court in Lerwill said nothing about whether the immunity it afforded would apply if the prosecutor stepped out of his role as an advocate and into the nonprosecutorial role of a witness or complainant.[8]

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[8]The Tenth Circuit's recent decision in Roberts v. Kling, ___ F.3d ___ (1997 WESTLAW 2885, filed January 6, 1997), similarly involved a District Attorney's investigator who was sued for "swearing out a complaint and seeking an arrest warrant" (id. at *3), not for making false statements in a nonadvocative document. Under New Mexico law, a "complaint" is the pleading that initiates a prosecution. See N.M. Stat. 31-1-4.

The two civil forfeiture cases Petitioner cites are similarly distinguishable. In Erlich v. Giuliani, 910 F.2d 1220 (4th Cir. 1990), the Court analogized the function of a prosecutor preparing a seizure warrant in a forfeiture proceeding to the act of a prosecutor seeking an indictment in a criminal case, a function clearly subject to absolute immunity. Erlich, 910 F.2d at 1224 (citing Malley, 475 U.S. at 340-43). The Erlich decision specifically distinguished this from the function performed by a complaining witness seeking an arrest warrant, Erlich, 910 F.2d at 1224, like the police officer in Malley and Ms. Kalina.

In Schrob v. Catterson, 948 F.2d 1402 (3rd Cir. 1991), the Court followed Erlich, but found the question "more difficult" with respect to the prosecutor's "alleged action in the preparation of an application for the search warrant." 948 F.2d at 1413. Schrob also addressed an allegation regarding an alleged false statement by the

prosecutor in the course of a colloquy with the court during a seizure warrant application. 948 F.2d at 1417. The court in Schrob "easily disposed of" that issue, citing to "lawyers[']... absolute immunity at common law for making false and defamatory statements in judicial proceedings." Ibid. There was no issue in Schrob directly analogous to the situation here--a false statement by a prosecutor, made not in a colloquy, but under oath, and not as a "lawyer", but a witness.

These cases stand for the unremarkable proposition that a prosecutor's preparation and presentation of an arrest or seizure warrant--lawyer's functions--are protected by absolute immunity. There is some disagreement about this. See, e.g., McSurley v. McClellan, 697 F.2d 309, 320 (D.C. Cir. 1982) (per curiam) (holding that a prosecutor's preparation of arrest and search warrants is a "nonadvocative" function that is not protected by absolute immunity). But there is and can be no doubt, after Malley,

that the function of complaining witnes is distinct and outside the absolute immunity shield.

D. Depriving Prosecutors of Absolute Immunity When They Act As Complaining Witnesses Impinges On No Valid State Interest.

This Court has repeatedly said hat absolute immunity is not a matter that is subjec to "freewheeling policy choice[s]," but exists only to th extent that it is consistent with historical practice. Bukley v. Fitzsimmons, 509 U.S. at 268; Malleyv. Briggs, 475 U.S. at 341. Ignoring that admonition, Petiioner and her amici raise the spectre of crippled law enforcement in an effort to persuade the Court to expand their proection. See Pet. 12-14; Brief of Petitioner's Amici at 6-7. These arguments are no more credible than they are relevant.

There is certainly no factual bais for Petitioner's concerns that the decision below will rsult in a flood of litigation. See Pet. 13; Brief of Petitioner's Amici at 6. As Petitioner's amici point out, Washington prosecutors

have filed charges by information by over 80 years, and for decades have commonly prepared their own certificates of probable cause (Brief of Petitioner's Amici at 2-3); yet in no reported case other than this one has a prosecutor been sued for that action. Doubtless, that is because the vast majority of prosecutors, in preparing such certificates, accurately report the facts contained in the police reports--thereby insuring themselves qualified immunity, even if the police reports prove inaccurate.[9]

The claim that prosecutors will be deterred or distracted from performing their duties out of fear of civil litigation, in the event they can be shown to have provided recklessly or willfully false testimony, is no more credible.

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[9]The Petition's claim that the decision below requires "only" that "a defendant turned litigant ... allege that the injury occurred as a result of the arrest rather than the prosecution" (Pet. 13) is pure hyperbole. The decision below removes absolute immunity only when the prosecutor acts as a complaining witness whose testimony causes an arrest; and even in those circumstances the shield of qualified immunity remains.

A prosecutor (or any other lawyer) who submits her own affidavit to a court, ex parte, risks criminal prosecution, and bar discipline, if the statements in that affidavit are willfully false. RCW 9A.72.040 (false swearing); Washington RPC 3.3(a), (f) (candor toward tribunals). An additional threat of civil litigation--on which the prosecutor is entitled to be defended and indemnified--can hardly add significantly to their worries.

If prosecutors have such an exaggerated fear of civil litigation, however, they have a simple recourse: they can use the testimony of police officers or other witnesses, instead of their own, to support their warrant applications.[10] Since Wasnington police reports are routinely made out under oath--as was the police report Ms. Kalina herself submitted in this case, Pet. App. 16a--that would not even

[10] Amici's suggestion that "resurrection of the grand jury system is the only way to avoid suits for damages from a defendant who resents being arrested to answer a charged crime" (Brief of Petitioner's Amici at 7) ignores this simple expedient.

impose a significant administrative burden. It would not only insulate prosecutors from civil liability; it would also improve the reliability and accuracy of information utilized to deprive citizens of their freedom by reducing the number of rewrites and repetitions, and focusing responsibility for any errors.

Utilizing police or other witness affidavits would also, of course, insure a wrongly arrested citizen has recourse for any deliberate or reckless falsehood. The deterrent effect of such recourse aids, does not retard, effective law enforcement; for unfounded "requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty." Malley v. Briggs, 475 U.S. at 344. There is no reason to depart from the common law or the functional test for absolute immunity to shield reckless

falsifications in support of such requests from all civil liability.

CONCLUSION

Certiorari should be denied.

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January 22, 1997.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

RODNEY FLETCHER Plaintiff	)	No.
vs.	)	COMPLAINT FOR DAMAGES
LYNNE KALINA Defendant	)	(Civil Rights 42 U.S.C. § 1983)

Plaintiff Rodney Fletcher, through his undersigned counsel, alleges as follows:

I. PARTIES

1.1 Rodney Fletcher is an adult resident of King County in the State of Washington.

1.2 Lynne Kalina is an adult resident of the State of Washington with a business address of King County Courthouse, 516 Third Avenue Room W554, Seattle, Washington.

II. JURISDICTION

2.1 This court has jurisdiction over this action pursuant to 42 U.S.C. § 1343, § 1983, and the Fourth and Fourteenth Amendments to the United States Constitution.

2.2 Plaintiff is a resident of King County, Washington and the events described herein occurred in King County, Washington.

III. FACTS

3.1 Defendant Lynne Kalina at all times relevant to this matter was employed by Norm Maleng, King County Prosecuting Attorney and by the Office of the King County Prosecuting Attorney, an Agency of King County.

3.2 On or about December 14, 1992 Lynne Kalina prepared and filed a Certification for Determination of Probable Cause ("Certification") a copy of which is attached as Exhibit A.

3.3 In the Certification, defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution.

3.4 In the Certification, defendant Lynne Kalina falsely accused Mr. Fletcher of breaking into the Our Lady of Guadalupe School in King County, Washington, and of committing certain acts while within the school, including damaging a vending machine and stealing property.

3.5 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher had never been associated with the school and did not have permission to enter the school. In fact, Mr. Fletcher had been hired to install partitions and had performed extensive work, at and for the school, was known to the school personnel and was authorized to enter onto the premises.

3.6 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher was identified from a photo montage by an eye witness. In fact, two eye witnesses failed to identify Mr. Fletcher from the photo montage and now witness identified him. These failed photo identifications were detailed specifically in the Seattle Police Department reports and statements that were available to Ms. Kalina at the time that she prepared the Certification.

3.7 Pursuant to the recitations in the Certification, an arrest warrant was issued for Rodney Fletcher and on September 24, 1993 Mr. Fletcher was arrested and incarcerated on a charge of Burglary in the Second Degree.

3.8 On or about October 26, 1993 the aforementioned charges were dismissed on motion of the Prosecuting Attorney.

IV. DAMAGES

4.1 As a direct and proximate result of the actions of Lynne Kalina described above, plaintiff suffered a loss of liberty, incurred legal fees, suffered damage to his reputation, experienced pain and suffering and emotional distress, suffered wage loss, and lost earning capacity and the enjoyment of life. Some of these damages are ongoing and permanent in nature.

V. CLAIM FOR RELIEF

5.1 The actions of defendant Kalina as alleged herein violated plaintiff's civil and constitutional rights, including the right to be free from unreasonable seizures and from deprivation of liberty, without due process of the law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 et seq.

VI. PRAYER

WHEREFORE, plaintiff prays for the following relief against defendant:

1. Full compensatory damages;

2. Punitive damages;

3. Attorney fees and costs under 42 U.S.C. 1988; and

4. Such other relief as is reasonable and equitable.

DATED this 12 day of January, 1995.

LAW OFFICES OF
BRADY R. JOHNSON

By /s/
Brady R. Johnson WSBA #21732

MacDONALD, HOAGUE & BAYLESS

By /s/
Timothy K. Ford, WSBA #5986

CAUSE NO. 92-1-07863-1

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Lynne Kalina is a Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054;

That this case contains the following upon which this motion for the determination of probable cause is made;

Our Lady of Guadalupe School is located at 3401 Southwest Myrtle Street, Seattle, King County, Washington. George Christman is the custodian of the school. On July 27, 1992, at 6:50, Christman discovered that sometime during the previous night, the kitchen window had been pried open in a manner which would allow entry into the school. Christman called the police.

Investigation showed that the burglar had cut a hole in a plexiglass kitchen window, reached in, and pried open the window. The burglar had ripped out a restrictive bar to allow the window to open fully. Once inside the building, the burglar had searched through cabinets and forced open several doors. The burglar had forced open a Coke machine, taking about $2 in change. The burglar had climbed over a glass partition into the school office and had taken a computer, two printers, and a modem. The burglar exited out of the office door.

Seattle Police Department Officer Burton was able to lift fresh latent prints from the partition and from a paper clip box which had been emptied. Seattle Police Department Identification Technician Holshue positively identified several prints lifted as Rodney Fletcher's prints. The defendant, Rodney Fletcher, has never been associated with the school in any manner and did not have permission to enter the school or to take any property.

On July 27, 1992, at 2:30 p.m., the defendant entered Empire Electronics and contacted employee Lance Brandon. The defendant asked Brandon to give an appraisal on a computer which was in his car. Brandon went to a car which was occupied by Jerry Ward. Brandon told the defendant that the computer was worth about $200, but wanted to see if the computer was in working order before buying it. The defendant brought the computer into the store.

Brandon noticed that the computer's serial number had been removed. Brandon told the defendant that he needed the serial number, so the defendant left the store to retrieve the serial number. Brandon worked with the computer while the defendant was absent and noticed information on the hard drive indicating that the computer belonged to Our Lady of Guadalupe School.

Brandon called the police, but before the police arrived, the defendant and Ward returned to the store. Brandon told the defendant that he could not buy the computer because the defendant did not have any identification. The defendant took the computer and left the store. Brandon later identified the defendant from a photo montage.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 7 day of December, 1992, at Seattle, Washington.

/s/
Lynne Kalina, WSBA #91002

Former CrR 2.2(a) (1992)

(a) Warrant of Arrest. If an indictment is filed or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on the request for a warrant, the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(2)

No. 96-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,
v.
RODNEY FLETCHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF AMICI CURIAE THIRTY-NINE WASHINGTON STATE COUNTIES IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1996

No. 96-792

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Prosecuting Attorneys of the thirty-nine Washington State Counties* hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The

* David Sandhaus, Adams County, Prosecuting Attorney; Ray Lutes, Asotin County, Prosecuting Attorney; Andrew K. Miller, Benton County, Prosecuting Attorney; Gary Riesen, Chelan County, Prosecuting Attorney; David Bruneau, Clallam County, Prosecuting Attorney; Arthur Curtis, Clark County, Prosecuting Attorney; Terry Nealey, Columbia County, Prosecuting Attorney; James Stonier, Cowlitz County, Prosecuting Attorney; Steven M. Clem, Douglas County, Prosecuting Attorney; Allen C. Nielson, Ferry County, Prosecuting Attorney; Steve M. Lowe, Franklin County, Prosecuting Attorney; John Henry, Garfield County, Prosecuting Attorney; John Knodell, Grant County, Prosecuting Attorney; H. Steward Menefee, Grays Harbor County, Prosecuting Attorney; William H. Hawkins, Island County, Prosecuting Attorney; David Skeen, Jefferson County, Prosecuting Attorney; Norm Maleng, King County, Prosecuting Attorney; Russell D. Hauge, Kitsap County, Prosecuting Attorney; Greg Zempel, Kittitas County,

consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent has not been sought because Rule 37(4) applies.

The interest of the Prosecuting Attorneys in this case arises from the fact that the Ninth Circuit opinion will have a chilling effect on their ability to fearlessly prosecute criminals and will divert needed public funds from criminal prosecution to the defense of civil lawsuits.

Respectfully submitted,

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Prosecuting Attorney; Knute Rife, Klickitat County, Prosecuting Attorney; Jeremy Randolf, Lewis County, Prosecuting Attorney; Ronald Shepherd, Lincoln County, Prosecuting Attorney; Gary Burleson, Mason County, Prosecuting Attorney; Rick Weber, Okanogan County, Prosecuting Attorney; Michael Smith, Pacific County, Prosecuting Attorney; Thomas A. Metzger, Pend Oreille County, Prosecuting Attorney; John Ladenburg, Pierce County, Prosecuting Attorney; Randall K. Gaylord, San Juan County, Prosecuting Attorney; David Needy, Skagit County, Prosecuting Attorney; Bradley Anderson, Skamania County, Prosecuting Attorney; James Krider, Snohomish County, Prosecuting Attorney; James Sweetser, Spokane County, Prosecuting Attorney; John G. Wetle, Stevens County, Prosecuting Attorney; Bernardean Broadous, Thurston County, Prosecuting Attorney; Fred A. Johnson, Wahkiakum County, Prosecuting Attorney; James L. Nagle, Walla Walla County, Prosecuting Attorney; David S. McEachran, Whatcom County, Prosecuting Attorney; James Kaufman, Whitman County, Prosecuting Attorney; Jeffrey C. Sullivan, Yakima County, Prosecuting Attorney.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-792

LYNNE KALINA,

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE THIRTY-NINE WASHINGTON STATE COUNTIES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

The State of Washington abandoned its mandatory grand jury practice some 80 years ago.[1] Since that time prosecutions have been instituted on information filed by the prosecutor, on many occasions without even a prior judicial determination of "probable cause". This procedure received this Court's approval in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

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[1] Washington Laws 1909, c. 87.

Thousands of criminal cases each year are initiated by information in the State of Washington by Prosecuting Attorneys and their deputies.[2] The filing of the information, under Washington law, can trigger the start of Washington's court rule speedy trial period.[3] A failure to secure the presence of the defendant in court within 104 days of the filing of the information may result in the dismissal of charges with prejudice.[4] Both the Washington courts and the Washington legislature have placed the burden of securing the presence of the defendant in court upon the prosecutor.[5]

In order to timely secure the defendant's presence for trial, the prosecuting attorney will often request a warrant of arrest.[6] Consistent with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103 (1975), such a request must be

---

[2] Both juvenile offender cases and criminal cases filed in the Washington superior courts are initiated by information. Washington Criminal Rule 2.1; R.C.W. 13.40.070. In 1993, 29,765 criminal cases and 24,360 juvenile offender cases were filed in the superior courts of Washington. In 1994, 30,395 criminal cases and 25,883 juvenile offender cases were filed in the superior courts of Washington. In 1995, 33,965 criminal cases and 27,716 juvenile offender cases were filed in the superior courts of Washington. *See* Office of the Administrator for the Courts, *Caseloads of the Courts of Washington 1995*, at 38 (1996).

[3] *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *State v. Striker*, 557 P.2d 847 (Wash. 1976).

[4] *See generally*, *State v. Stewart*, 922 P.2d 1356, 1360 (Wash. 1996); *Greenwood*, 845 P.2d at 974; *Striker*, 557 P.2d at 852.

[5] R.C.W. 36.27.020(6); *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood*, *supra*.

[6] Prosecutors' attempts to satisfy the Washington speedy trial court rule by mailing letters to the defendants that advise them of the pending charges have had mixed success in the Washington courts. *See, e.g., State v. Marler*, 911 P.2d 420 (Wash. App.), *review denied*, 919 P.2d 601 (Wash. 1996); *State v. Bazan*, 904 P.2d 1167 (Wash. App. 1995), *review denied*, 919 P.2d 600 (Wash. 1996).

accompanied by a certificate or statement of probable cause to support the charge. Under Washington law,[7] the certificate of probable cause can consist solely of a summary of the contents of the police reports.[8]

The certificate of probable cause is utilized by the court and the prosecution for purposes other than obtaining a warrant of arrest. The facts contained in the certificate of probable cause are considered in determining the amount of bail or other conditions of pretrial release.[9] Facts contained in the certificate of probable cause are considered in determining whether a defendant had notice of all of the elements of an offense.[10]

The information contained in the certificate of probable cause can form the factual basis for a guilty plea.[11] The facts contained in the certificate of probable cause may be considered in deciding whether a defendant is entitled to a judgment of acquittal by reason of insanity.[12]

The facts in the certificate of probable cause are relied upon to establish whether a spouse is competent to testify

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[7] Other Ninth Circuit states also allow their certificates of probable cause to be based solely upon the hearsay contents of police reports. *See, e.g.*, Idaho Criminal Rule 4.

[8] Washington Criminal Rule 2.2(a); Washington Juvenile Court Rule 7.5(b).

[9] Washington Criminal Rule 3.2(a).

[10] *State v. Kjorsvik*, 812 P.2d 86 (Wash. 1991); *State v. Garcia*, 829 P.2d 241 (Wash. App.), *review denied*, 838 P.2d 1143 (Wash. 1992); *State v. Bryant*, 828 P.2d 1121 (Wash. App.), *review denied*, 833 P.2d 1389 (Wash. 1992).

[11] *See, e.g., State v. Saas*, 820 P.2d 505 (Wash. 1991); *State v. Arnold*, 914 P.2d 762, 765 (Wash. App.) ("The judge stated positively that he always reads and considers those certificates, and that he did so this time [when accepting a guilty plea]"), *review denied*, 925 P.2d 989 (Wash. 1996).

[12] *State v. Autrey*, 794 P.2d 81 (Wash. App.), *review denied*, 802 P.2d 127 (Wash. 1990).

against a defendant without the defendant's permission.[13] Information in a certificate of probable cause can establish whether a prior conviction is admissible for impeachment purposes under Washington Evidence Rule 609.[14] The material in a certificate of probable cause can be utilized by the court in determining a proper sentence.[15]

Material contained in a certificate of probable cause can provide the background facts for Washington's appellate courts.[16] Information in a certificate of probable cause has been utilized by the Washington Supreme Court to determine which portion of an obscenity statute applied to a particular case.[17]

The Ninth Circuit's opinion in *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), has stripped prosecutors of their absolute immunity for engaging in routine procedures under Washington law for initiating and pursuing criminal prosecutions. The Ninth Circuit's opinion, if left intact, will severly impact prosecutors' ability to vigorously and fearlessly perform their duty. The Ninth Circuit's ruling diverts scarce prosecutorial resources from the enforcement of criminal laws to the defense of civil lawsuits.

ARGUMENT

Public prosecutors must administer their offices with courage and independence. Both of these qualities are impeded when the prosecutor is made subject to suit by those whom she accuses and fails to convict. *Imbler v.*

[13] *State v. Thornton*, 835 P.2d 216 (Wash. 1992).

[14] *See, e.g., State v. Schroeder*, 834 P.2d 105 (Wash. App. 1992).

[15] *State v. Overvold*, 825 P.2d 729 (Wash. App. 1992); *State v. Cooper*, 816 P.2d 784 (Wash. App. 1991); *State v. Tindal*, 748 P.2d 695 (Wash. App. 1988).

[16] *See, e.g., State v. Herzog*, 771 P.2d 739 (Wash. 1989); *State v. Becker*, 801 P.2d 1015 (Wash. App. 1990).

[17] *State v. Reece*, 757 P.2d 947 (Wash. 1988), *cert. denied*, 493 U.S. 812 (1989).

Pachtman, 424 U.S. 409, 423-24 (1976), quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935). Accordingly, this Court has provided prosecutors with absolute immunity under § 1983 law suits for actions intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

The Ninth Circuit ignores the teachings of *Imbler* in its decision in *Fletcher v. Kalina, supra.* The Ninth Circuit, focusing on the issuance of the arrest warrant, instead of the purpose for the warrant and the warrant's relationship to the charging function, determined that prosecutors are only entitled to qualified immunity for any errors contained in the certificate of probable cause.[18] Other Circuits, which have focused on the purpose of a post-charging arrest warrant, have had little difficulty in finding that absolute immunity should be extended to prosecutors who request the arrest warrants.[19]

The Ninth Circuit decision in *Fletcher v. Kalina*, assumes the sole purpose of the certificate of probable cause is to secure a warrant of arrest. Such is not the case. In Washington, the certificate of probable cause is intimately associated with the judicial process in other ways, as well.

Generally, the certificate of probable cause is the only document in the court file that outlines in detail the facts in every criminal prosecution. The certificate of probable cause is intimately associated with the entire judicial process, beginning with the filing of an information, through sentencing and appeal. As such, prosecutors must

[18] *Fletcher v. Kalina*, 93 F.3d at 655.

[19] *See Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case).

enjoy absolute immunity for drafting, signing, and filing the certificates. By likening a warrant secured by a police officer to a prosecutor's certificate of probable cause, the Ninth Circuit erred.

While absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity, the fate of prosecutors with qualified immunity depends upon the circumstances and motivations of the prosecutors' actions, as established by the evidence at trial.[20] A prosecutor who merely enjoys qualified immunity must answer in court each time a person charges him or her with wrongdoing. This diverts the prosecutor's energy and attention from the pressing duty of enforcing the criminal laws.[21] Moreover, as this Court noted in *Imbler*, suits that survive the pleadings would pose substantial danger of liability even to the honest prosecutor:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or adminisrtative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.[22]

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with strict and fair law enforcement. Washington prosecutors generally lack the resources for conducting their own investigations. They determine whether

[20] *See Imbler*, 424 U.S. at 419 n. 13, citing *Scheuer v. Rhodes*, 416 U.S. 232, 238-39 (1974); *Wood v. Strickland*, 420 U.S. 308, 320-22 (1975).

[21] *Imbler*, 424 U.S. at 424.

[22] *Imbler*, 424 U.S. at 425-26.

to file charges on the basis of investigations conducted by law enforcement agencies. The opinion casts the legitimacy of this procedure into doubt. It suggests that prosecutors will be liable if they should have known that the facts reported by police are false. This requires them to conduct investigations of some indeterminate scope.

Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors now wonder if a decision to rely upon police officers' reports in preparation of certificates of probable cause instead of personally re-interviewing witnesses will engender liability for failure to investigate. Prosecutors now wonder if a decision to rely upon affidavits that summarize the evidence in support of a request for a post-charging warrant of arrest instead of requiring the complainant and other witnesses to appear personally before the judge for questioning will engender liability for omitting a fact that might later prove exculpatory. Finally, prosecutors now wonder whether resurrection of the grand jury system is the only way to avoid suits for damages from a defendant who resents being arrested to answer a charged crime.[23] Unfortunately, all of these procedures to limit potential liability are time-consuming and will result in a marked decline in criminal prosecution and the very real possibility that felons will go unpunished.

[23] The Federal Courts appear to agree that prosecutors are immune from § 1983 liability for their conduct before a grand jury. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 661 (2nd Cir. 1995); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S. Ct. 740 (1995).

CONCLUSION

This Court should grant Lynne Kalina's Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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(4)

No. 96-792

IN THE

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LYNNE KALINA,

Petitioner,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 18, 1996
CERTIORARI GRANTED FEBRUARY 24, 1997

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UNITED STATES DISTRICT COURT
WESTERN WASHINGTON
(SEATTLE)

No. C 95-3792

RODNEY FLETCHER,
Plaintiff

v.

LYNNE KALINA,
Defendant

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
8/13/95	1	COMPLAINT FOR DAMAGES (Summons(es) issued) Receipt #222324 (jg) [Entry date 08/14/95]
6/12/95	6	ANSWER to complaint [1-1] by defendant Lynne Kalina; jury demand (jg) [Entry date 06/13/95]
6/12/95	7	AFFIDAVIT OF SERVICE by defendant Lynne Kalina of answer [6-1] (jg) [Entry date 06/13/95]
8/4/95	12	MOTION by defendant Lynne Kalina for summary judgment noted for 9/1/95 (jg) [Entry date 08/07/95]
8/4/95	13	MEMORANDUM by defendant Lynne Kalina in support of motion for summary judgment [12-1] (jg) [Entry date 08/07/95]
8/4/95	14	AFFIDAVIT of Lynne Kalina regarding motion for summary judgment [12-1] (jg) [Entry date 08/07/95]

DATE		PROCEEDINGS
8/24/95	15	RESPONSE by plaintiff to motion for summary judgment [12-1] (rs) [Entry date 08/25/95]
8/31/95	16	REPLY MEMORANDUM by defendant Lynne Kalina in support of motion for summary judgment [12-1] (jg) [Entry date 09/05/95]
8/31/95	17	AFFIDAVIT OF SERVICE by defendant Lynne Kalina of motion reply in support of mtn for sum jgm [16-1] (jg) [Entry date 09/05/95]
10/19/95	18	MINUTE ORDER: by Judge Thomas S. Zilly DENYING Dft's motion for summary judgment [12-1] (cc: counsel, Judge) (jg) [Entry date 10/20/95]
10/30/95	19	NOTICE OF APPEAL by defendant Lynne Kalina from Dist. Court decision [18-1] (cc: CCA, Judge, counsel) (ss) [Entry date 11/03/95]
10/30/95	21	AFFIDAVIT OF SERVICE by defendant Lynne Kalina of appeal [19] and representation statement [20] (ss) [Entry date 11/03/95]
11/3/95	—	CERTIFICATE OF RECORD Transmitted to USCA (cc: all counsel) (ss)
11/3/95	—	APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (ss)
11/3/95	—	ENT- "CADS" to CCA with appeals packet (ss)
11/8/95	—	Filed certificate of record on appeal RT filed in DC n/t [95-36129] (sf)
11/8/95	—	Filed attorney for Appellant Civil Appeals Docketing Statement served on 10/30/95 (to CONFATT) [95-36129] [95-36129] (sf)

DATE		PROCEEDINGS
6/21/96	—	CLERK'S RECORD on APPEAL transmitted to Circuit (ss)
7/10/96	—	Filed, as of 11/08/95, certified record on appeal in 1 Vols. (total): 1 Clerks Rec 0 RTs (Original) [95-36129] (sm)
8/7/96	—	ARGUED AND SUBMITTED TO Eugene A. WRIGHT, Robert R. BEEZER, Diarmuid F. O'SCANNLAIN [95-36129] (tsp)
8/22/96	—	FILED OPINION: We AFFIRM THE denial of summary judgment and REMAND for further proceedings. (Terminated on the Merits after Oral Hearings; Affirmed; Written, Signed, Published. Eugene A. WRIGHT, author; Robert R. BEEZER; Diarmuid F. O'SCANNLAIN) FILED AND ENTERED JUDGMENT. [95-36129] (sm)
9/9/96	—	Filed Appellant Lynne Kalina's motion to stay the mandate. [95-36129] served on 9/6/96 [Author JUDGE] [95-36129] (mhf)
9/18/96	—	Filed order (Eugene A. WRIGHT): Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b). Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. [3080681-1] [95-36129] (sm)
12/3/96	—	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 96-792 filed on 11/18/96. [95-36129] (mlm)
2/28/97	—	Received notice from Supreme Court, petition for certiorari GRANTED on 2/24/97. Supreme Court No. 96-792 PANEL (em)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

No. C95-03792

RODNEY FLETCHER,
Plaintiff

vs.

LYNNE KALINA,
Defendant

COMPLAINT FOR DAMAGES

(Civil Rights 42 U.S.C. § 1983)

Plaintiff Rodney Fletcher, through his undersigned counsel, alleges as follows:

I. PARTIES

1.1 Rodney Fletcher is an adult resident of King County in the State of Washington.

1.2 Lynne Kalina is an adult resident of the State of Washington with a business address of King County Courthouse, 516 Third Avenue Room W554, Seattle, Washington.

II. JURISDICTION

2.1 This court has jurisdiction over this action pursuant to 42 U.S.C. § 1343, § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution.

2.2 Plaintiff is a resident of King County, Washington and the events described herein occurred in King County, Washington.

III. FACTS

3.1 Defendant Lynne Kalina at all times relevant to this matter was employed by Norm Maleng, King County Prosecuting Attorney and by the Office of the King County Prosecuting Attorney, an Agency of King County.

3.2 On or about December 14, 1992 Lynne Kalina prepared and filed a Certification for Determination of Probable Cause ("Certification") a copy of which is attached as Exhibit A.

3.3 In the Certification, defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution.

3.4 In the Certification, defendant Lynne Kalina falsely accused Mr. Fletcher of breaking into the Our Lady of Guadalupe School in King County, Washington, and of committing certain acts while within the school, including damaging a vending machine and stealing property.

3.5 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher had never been associated with the school and did not have permission to enter the school. In fact, Mr. Fletcher had been hired to install partitions and had performed extensive work, at and for the school, was known to the school personnel and was authorized to enter onto the premises.

3.6 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher was identified from a photo montage by an eye witness. In fact, two eye witnesses failed to identify Mr. Fletcher from the photo montage and now [sic] witness identified him. These failed photo identifications were detailed specifically in the Seattle Police Department reports and statements that were available to Ms. Kalina at the time that she prepared the Certification.

3.7 Pursuant to the recitations in the Certification, an arrest warrant was issued for Rodney Fletcher and on September 24, 1993 Mr. Fletcher was arrested on a charge of Burglary in the Second Degree.

3.8 On or about October 26, 1993 the aforementioned charges were dismissed on motion of the Prosecuting Attorney.

IV. DAMAGES

4.1 As a direct and proximate result of the actions of Lynne Kalina described above, plaintiff suffered a loss of liberty, incurred legal fees, suffered damage to his reputation, experienced pain and suffering and emotional distress, suffered wage loss, and lost earning capacity and the enjoyment of life. Some of these damages are ongoing and permanent in nature.

V. CLAIM FOR RELIEF

5.1 The actions of defendant Kalina as alleged herein violated plaintiff's civil and constitutional rights, including the right to be free from unreasonable seizures and from deprivation of liberty, without due process of the law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States and 42 U.S.C. § 1983 *et seq.*

VI. PRAYER

WHEREFORE, plaintiff prays for the following relief against defendant:

1. Full compensatory damages;
2. Punitive damages;
3. Attorney fees and costs under 42 U.S.C. § 1988; and
4. Such other relief as is reasonable and equitable.

DATED this 12th day of January, 1995.

LAW OFFICES OF
BRADY R. JOHNSON

By /s/ Brady R. Johnson
BRADY R. JOHNSON WSBA #21732

MACDONALD, HOAGUE & BAYLESS

By /s/ Timothy K. Ford
TIMOTHY K. FORD, WSBA #5986

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,

Plaintiff

vs.

LYNNE KALINA,

Defendant

ANSWER OF DEFENDANT AND DEMAND FOR JURY

For her answer to plaintiff's Complaint for Damages, defendant Lynne Kalina admits, denies and alleges as follows:

I. PARTIES

1.1 Answering paragraph 1.1 of plaintiff's complaint, defendant admits the allegations therein.

1.2 Answering paragraph 1.2 of plaintiff's complaint, defendant admits the allegations therein.

II. JURISDICTION

2.1 Answering paragraph 2.1 of plaintiff's complaint, defendant makes no answer as the allegations contained therein are a legal conclusion.

2.2 Answering paragraph 2.2 of plaintiff's complaint, defendant admits the allegations therein.

III. FACTS

3.1 Answering paragraph 3.1 of plaintiff's complaint, defendant admits the allegations therein.

3.2 Answering paragraph 3.2 of plaintiff's complaint, defendant admits the allegations therein.

3.3 Answering paragraph 3.3 of plaintiff's complaint, defendant denies the allegations therein.

3.4 Answering paragraph 3.4 of plaintiff's complaint, defendant denies the allegations therein.

3.5 Answering paragraph 3.5 of plaintiff's complaint, defendant denies the allegations therein.

3.6 Answering paragraph 3.6 of plaintiff's complaint, defendant denies the allegations therein based on lack of information and knowledge.

3.7 Answering paragraph 3.7 of plaintiff's complaint, defendant admits the allegations therein.

3.8 Answering paragraph 3.8 of plaintiff's complaint, defendant admits the allegations therein.

IV. DAMAGES

4.1 Answering paragraph 4.1 of plaintiff's complaint, defendant denies the allegations therein.

V. CLAIM FOR RELIEF

5.1 Answering paragraph 5.1 of plaintiff's complaint, defendant denies the allegations therein.

BY WAY OF FURTHER ANSWER AND AS AFFIRMATIVE DEFENSE, defendant alleges as follows:

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Defendant is immune from suit based on the doctrine of absolute prosecutorial immunity.

3. Defendant at all times acted in good faith in the performance of her duties and is therefore qualified immune.

4. Plaintiff's claim is frivolous and advance without good cause.

WHEREFORE, defendant requests that plaintiff's claims be dismissed with prejudice, that plaintiff take nothing by his complaint and that defendant be awarded her costs, reasonable attorneys fees and sanctions against plaintiff and his attorneys for bringing this action.

JURY DEMAND

This party hereby demands this case be tried to a jury of twelve persons.

DATED this 9 day of June, 1995.

NORM MALENG
King County Prosecuting
Attorney

By: /s/ John W. Cobb
JOHN W. COBB
WSBA #14304
Senior Deputy Prosecuting
Attorney
Attorneys for Defendant

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HONORABLE THOMAS S. ZILLY

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

AFFIDAVIT OF LYNNE KALINA

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Lynne Kalina, being first duly sworn on oath, deposes and states as follows:

1. I am a Deputy Prosecuting Attorney for King County and have been so employed since October 15, 1990. I have personal knowledge of the matters contained herein and I am competent to testify.

2. In November, 1992, I was assigned to the filing unit within our office. My duties in that position included the review of cases referred by various police agencies for the purpose of determining whether criminal charges should be filed. On November 30, 1992, the Seattle Police Department referred a burglary case to our office in which the suspect was the plaintiff, Rodney Steven Fletcher. I reviewed this case and determined that our office would file criminal charges against Mr. Fletcher.

3. On or about December 7, 1992, I personally prepared an Information charging Mr. Fletcher with Burglary in the Second Degree. A true and correct copy of that Information is attached hereto as exhibit A. On that same date, I also prepared a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail (attached as Exhibit B) and a Certification for Determination of Probable Cause (attached as Exhibit C) which I personally signed.

4. All three of the documents referred to in paragraph 3 above where [*sic*] filed with the King County Superior Court on December 14, 1992. That same day, the Honorable Carmen Otero granted my motion and ordered that an arrest warrant be issued for Mr. Fletcher so that he could be brought before the Court to respond to the charges against him.

5. The filing of the Information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

/s/ Lynne Kalina
LYNNE KALINA

[Notary Omitted in Printing]

EXHIBIT A

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
Plaintiff,
v.
RODNEY STEVEN FLETCHER,
Defendant.

INFORMATION

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse RODNEY STEVEN FLETCHER of the crime of Burglary in the Second Degree, committed as follows:

That the defendant RODNEY STEVEN FLETCHER in King County, Washington during a period of time intervening between July 26, 1992 through July 27, 1992, did enter and remain unlawfully in a building, located at 3401 Southwest Myrtle Street, Seattle (Our Lady of Guadalupe School), in said county and state, with intent to commit a crime against a person or property therein;

Contrary to RCW 9A.52.030, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

EXHIBIT B

[Filecd Dec. 14, 1992]

SUPERIOR COURT OF WASHIINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTONN,
Plaintiff,
v.
RODNEY STEVEN FLETCHERR,
Deefendant.

MOTION AND ORDER DETERMIINING THE EXISTENCE OF PROBABLE (CAUSE, DIRECTING ISSUANCE OF WARRRANT AND FIXING BAIL

The plaintiff, having informed the courrt that it is filing herein an Information charging the defeendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existerence of probable cause and directing the issuance of a vwarrant for the arrest of the defendant, and

( ) fixing the bail of the defendannt in the amount of ———, cash or approved surety l bond.

(X) directing the release of the ddefendant, after booking, on his or her personal reecognizance and promise to appear for arraignment aat the scheduled time and date.

In connection with this motion, the plaaintiff offers the information on the Suspect Information FReport attached to this motion and the affidavit attacheed to the Information.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #9102
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein hereby determines that probable cause exists to believe that the above-named defendant committed the crime alleged in the Information herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the arrest of the above-named defendant; and

IT IS FURTHER ORDERED that

( ) the bail of the defendant be fixed in the amount of ———, cash or approved surety bond.

(X) the defendant be released, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

IT IS FURTHER ORDERED that the defendant be advised of the amount of bail fixed by the court and/or conditions of his or her release, and of his or her right to request a reduction of bail and to be heard thereon. Service of the warrant by telegraph or teletype is authorized.

DONE IN OPEN COURT this 14 day of December, 1992.

/s/ Carmen Otero
Judge

Presented by:

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

SUSPECT INFORMATION REPORT

CASE NO. 9 2 3 3 4 0 5 4

SEATTLE POLICE DEPARTMENT — UNIT 313 — B/TS 92- 276 FILE NO.

DATE OF REPORT	TIME	OFFENSE	B/A NUMBER
11-23-92	1300	BURGLARY	

BOOKING DATE	TIME

NAME (LAST, FIRST, MIDDLE - JR., SR., 1ST, 2ND, 3RD)	SEX	RACE
FLETCHER, Rodney Steven	male	white

DATE OF BIRTH	STATE OR PROVINCE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SKIN TONE
092760	Minnesota	6-2	190	bln	blue	med

SCARS, MARKS, TATTOOS, ARTIFICIAL BODY PARTS, ETC.	CAUTION - ARMED, DANGEROUS	STATEMENT TAKEN?	OWN REAL PROPERTY?
	No	No	Unk

LAST KNOWN ADDRESS - CITY, STATE, ZIP	TELEPHONE NUMBER	DRIVER LICENSE NUMBER
24823 21st Ave S. Kent		FLETCRS40207

STATE	EXPIRES	SOCIAL SECURITY NUMBER	LOCAL NUMBER	FBI NUMBER	STATE ID NUMBER
XXX WA	92			583044W8	

FINGERPRINT CLASSIFICATION	ALIAS NAME(S)	VEH. LIC. NO.	STATE	EXP.

VEHICLE I.D. NO.	YEAR	MAKE	MODEL	STYLE	COLOR(S)

OCCUPATION	BUSINESS ADDRESS OR SCHOOL (COMPANY NAME - ADDRESS - DEPARTMENT OR SHOP NO. AND PHONE)
Laborer	Unk

MARITAL STATUS - CHILDREN (NO.)	LIVING WITH	TIME IN COUNTY	UNION AND LOCAL NUMBER
Unk			

INVESTIGATING OFFICER	SERIAL	UNIT	PHONE	APPROVING OFFICER
Det G K Ruedebusch	2734	313	386-1875	3539

CRIMINAL RECORD (CONVICTIONS)	ACTIVE PROBATION OR PAROLE PROBATION OFFICER, PHONE ☐YES ☐NO	NAME(S) OF ACCOMPLICE
None		

ARRESTING AGENCY AFFIDAVIT

(CONCISELY SET FORTH FACTS SHOWING PROBABLE CAUSE FOR EACH ELEMENT OF THE OFFENSE AND THAT THE SUSPECT COMMITTED THE OFFENSE. IF NOT PROVIDED, THE SUSPECT WILL BE AUTOMATICALLY RELEASED. INDICATE ANY WEAPON INVOLVED).

On 7-26-92 between 1400 hrs and0650 hrs on 7-27-92 susp went to Our Lady of Guadalupe school, located at 3401 SW Myrtle St, Seattle, WA. Susp broke into VB and stole a computer, two printers and a modem. Susp's finger prints were I.D. inside VB in a location that could only be put there by the susp. Susp did not have permissinn to enter or remove anything from VB.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11-23-92 SPD — DATE AND PLACE

Det G. Ruedebusch spd — SIGNATURE/AGENCY

1

LAW ENFORCEMENT POSITION ON RELEASE:
WOULD SAFETY OF INDIVIDUAL OR PUBLIC BE THREATENED IF SUSPECT RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY - BE SPECIFIC)? ANY OTHER REASONS WHY SUSPECT SHOULD NOT BE RELEASED (CONSIDER PRIOR FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY - BE SPECIFIC).

NONE

2

ANTICIPATED DATE OF REFERRAL:	ANTICIPATED CHARGE:
11-24-92	BURGLARY

PRELIMINARY APPEARANCE INFORMATION DATE:	JUDGE:	BOND POSTED DATE:	AMOUNT:$	CO:
O.R.: YES ☐ NO ☐	CONDITIONS:			

RETURN DATE: — RETURNED: YES ☐ NO ☐ — EXCUSED: YES ☐ NO ☐ — NOT RELEASED ☐ — BOND SET:$

EXHIBIT C

CAUSE NO. 92-1-07863-1

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Lynne Kalina is a Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054;

That this case contains the following upon which this motion for the determination of probable cause is made.

Our Lady of Guadalupe School is located at 3401 Southwest Myrtle Street, Seattle, King County, Washington. George Christman is the custodian of the school. On July 27, 1992, at 6:50, Christman discovered that sometime during the previous night, the kitchen window had been pried open in a manner which would allow entry into the school. Christman called the police.

Investigation showed that the burglar had cut a hole in a plexiglass kitchen window, reached in, and pried open the window. The burglar had ripped out a restrictive bar to allow the window to open fully. Once inside the building, the burglar had searched through cabinets and forced open several doors. The burglar forced open a Coke machine, taking about $2 in change. The burglar had climbed over a glass partition into the school office and had taken a computer, two printers, and a modem. The burglar exited out of the office door.

Seattle Police Department Officer Burton was able to lift fresh latent prints from the partition and from a paper clip box which had been emptied. Seattle Police Department Identification Technician Holshue positively identified several prints lifted as Rodney Fletcher's prints. The defendant, Rodney Fletcher, has never been asso-

ciated with the school in any manner and did not have permission to enter the school or to take any property.

On July 27, 1992, at 2:30 p.m., the defendant entered Empire Electronics and contacted employee Lance Brandon. The defendant asked Brandon to give an appraisal on a computer which was in his car. Brandon went to a car which was occupied by Jerry Ward. Brandon told the defendant that the computer was worth about $200, but wanted to see if the computer was in working order before buying it. The defendant brought the computer into the store.

Brandon noticed that the computer's serial number had been removed. Brandon told the defendant that he needed the serial number, so the defendant left the store to retrieve the serial number. Brandon worked with the computer while the defendant was absent and noticed information on the hard drive indicating that the computer belonged to Our Lady of Guadalupe School.

Brandon called the police, but before the police arrived, the defendant and Ward returned to the store. Brandon told the defendant that he could not buy the computer because the defendant did not have any identification. The defendant took the computer and left the store. Brandon later identified the defendant from a photo montage.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 7 day of December, 1992, at Seattle, Washington.

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002

[Filed Oct. 19, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,

Plaintiff,

v.

LYNNE KALINA,

Defendant.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court DENIES defendant's motion for summary judgment, docket no. 12. *Buckley v. Fitzsimmons,* 509 U.S. ——, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1933); *Malley v. Briggs,* 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986); *Imbler v. Pachtman,* 424 U.S. 409, 47 L.Ed.2d 128, 96 S. Ct. 984 (1976). The Court concludes that defendant is not entitled to absolute immunity. *Buckley v. Fitzsimmons,* 509 U.S. ——, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1933); *Malley v. Briggs,* 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986). Whether qualified immunity will apply in this case is a question of fact.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 19th day of October, 1995.

BRUCE RIFKIN
Clerk

By /s/ Casey Condon
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129
D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,
v.

LYNNE KALINA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
August 7, 1996—Seattle, Washington

Filed August 22, 1996

Before: Eugene A. Wright, Robert R. Beezer and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

OPINION

WRIGHT, Circuit Judge:

We must decide whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity. We hold that, based on *Malley v. Briggs,* 475 U.S. 335, 342 (1986) and the functional analysis test, the prosecutor is not entitled to absolute immunity. We affirm and remand.

BACKGROUND:

In determining immunity, we must accept the plaintiff's allegations as true. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 261 (1993). Lynne Kalina, a deputy prosecutor, was assigned to work on a case involving alleged theft of computer equipment from a private school in Seattle. She prepared an application for an arrest warrant and an information charging Rodney Fletcher with second-degree burglary. The warrant application was accompanied by a "Certification for Determination of Probable Cause," a sworn declaration describing the result of the police investigation. Based on this document, which she signed, the court issued an arrest warrant for Fletcher. The burglary charge was eventually dismissed when Fletcher's attorney discovered inaccuracies in the certification.

Fletcher brought a 42 U.S.C. § 1983 claim against Kalina in federal district court alleging civil rights violations. He contends that the certification contained information that Kalina knew or should have known was false. First, it said that Fletcher "has never been associated with the school in any manner and did not have permission

to enter the school or to take any property." Fletcher alleged that he had been hired by the school to install the glass partition on which his prints were found and that he had permission to enter the school. Second, the certification said that an electronics store employee identified Fletcher as the man who attempted to sell him computer equipment from the school. Fletcher contended that police reports indicated that no witness had identified him as a suspect although two were shown photo montages.

Upon a motion for summary judgment, the district court denied Kalina absolute immunity and held that qualified immunity was a question of fact to be determined at trial. This interlocutory appeal followed. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); 28 U.S.C. § 1291. We review de novo. *Jesinger v. Nevada Fed. Cred. Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

ANALYSIS:

Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court first considered absolute immunity for prosecutors. The Court recognized that the prosecutor's job is both difficult and essential. It noted that the "office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict?" *Id.* at 422-24. The Court held that prosecutors were absolutely immune from prosecution for their actions during the initiation of a criminal case and its presentation at trial. The Court described there functions as "intimately associated with the judicial phase of the criminal process." *Id.* at 424.

The Court later explicitly held that when prosecutors perform administrative or investigative, rather than advocatory, functions they do not receive absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 494-96 (1991). To determine whether an action is administrative/investigative or advocatory, we apply a "functional" analysis. *See id.* at 486. We look at "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). It follows that, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Since *Imbler*, the Court has addressed prosecutorial immunity in two cases. In *Burns*, 500 U.S. at 487, it held that a prosecutor is absolutely immune for his conduct in presenting evidence at a probable-cause hearing for a search warrant, but is not absolutely immune when giving legal advice to the police on whether they have probable cause to arrest. The Court reasoned that appearing in court and presenting evidence were "clearly" advocatory. *Id.* at 491. It did not believe, however, that advising the police on whether they could hypnotize a witness and whether they had probable cause to arrest was so closely associated with the judicial process that it required absolute immunity. *Id.* at 493. The Court emphasized that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87.

In *Buckley*, 509 U.S. at 273, the Court held that a prosecutor is not absolutely immune when he allegedly fabricates evidence during the investigation by retaining a dubious expert witness. The Court reasoned that, because the prosecutor did not yet have probable cause to arrest at the time he was shopping for an expert witness, the function was investigative, not advocatory.[1] The Court commented that:

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[1] The Court also held that the prosecutor's allegedly false statements during a press conference were not protected by absolute

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. (citation omitted).

The Supreme Court has never addressed whether a prosecutor is absolutely immune for conduct in obtaining a search warrant. In *Malley v. Briggs*, 475 U.S. 335, 342 (1986), however, the Court held that a *police officer* who secures an arrest warrant without probable cause cannot assert an absolute immunity defense.

The officer made two arguments, both rejected by the Court. He analogized himself to a complaining witness who files a certification. *Id.* at 340. The Court found this argument unavailing because complaining witnesses were not absolutely immune at common law. *Id.* at 340. The officer next argued that his action was similar to a prosecutor seeking an indictment, a function that merits absolute immunity. The Court also rejected this argument, reasoning that the officer's actions were "further removed from the judicial phase of criminal proceedings. . . ." *Id.* at 342-43.

Relying on *Malley* and *Buckley*, we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant. *See also Kohl v.*

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immunity because the comments had no direct tie to the judicial process and because out-of-court statements to the press were not absolutely immune at common law. *See Buckley*, 509 U.S. at 276-78.

Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) ("the function of seeking an arrest warrant is subject only to qualified immunity, not absolute immunity."). Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*.[2]

Kalina argues that it is "standard practice" in King County for the prosecutor to prepare the certification, but the local rules do not limit who may prepare it. *See* Wash. Superior Ct. Cr. R. 2.2(a). If a police officer or complaining witness had filed the same certification, she or he would not receive absolute immunity. *See Malley*, 475 U.S. at 340-41. To hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis.

We note that the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant. In *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987), the court held that the "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution,' which is protected under *Imbler*."[3] In light of more recent Supreme Court law and

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[2] We are not persuaded by Kalina's argument that *Malley* can be distinguished based upon the time the declaration was filed. She argues that Officer Malley filed his declaration early in the case, which made his action investigatory. She contends that her declaration was filed later, making it an advocatory act. In *Malley*, 475 U.S. at 337, the application for an arrest warrant was filed simultaneously with the felony complaint. Here, the application for the arrest warrant was filed with the information. There is little, if any, distinction.

[3] Kalina also relies on *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983)). In *Lerwill*, 712 F.2d at 437, the Tenth Circuit granted a prosecutor absolute immunity because "[i]n seeking a warrant for . . . arrest, [the prosecutor] was acting as an advocate for the

the Eighth Circuit's opinion in *Kohl*, we decline to follow the Sixth Circuit. *Joseph* was issued before the Supreme Court decided *Buckley*, which emphasized that it would be "incongruous" to expose police to potential liability while protecting prosecutors for the same act. Moreover, although decided shortly after *Malley*, the opinion does not consider that case in deciding whether seeking an arrest warrant merits absolute immunity.

Finally, Kalina argues that policy concerns dictate a finding of absolute immunity. Absolute immunity serves a vital public interest by protecting prosecutors from distracting and time-consuming litigation. The Supreme Court, however, has made it clear that qualified immunity is generally sufficient to protect against frivolous lawsuits. The district court explicitly noted that qualified immunity was a question of fact in this case. We emphasize that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has noted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

CONCLUSION:

Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant. We AFFIRM the denial of summary judgment and REMAND for further proceedings.

State before a neutral magistrate." This case, however, predates *Malley*, *Burns* and *Buckley*.

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(d) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(e) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(f) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the pros-

ecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(b) Issuance of Summons in Lieu of Warrant.

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue.* If the indictment or information charges only the commission of a misdemeanor or a gross misdemeanor, the court shall direct the clerk to issue a sumons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons.* A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the

defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall comand that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall,

on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assesor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commissioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.

(5)

No. 96-792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LYNNE KALINA,
Petitioner,

v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Is a prosecutor who has brought formal criminal charges against a defendant entitled to absolute immunity from an action under 42 U.S.C. § 1983 based entirely on the prosecutor's conduct in causing an arrest warrant to issue, pursuant to state statute and court rule, for the purpose of bringing the defendant before the court to respond to the charges?

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PETITIONER'S BRIEF ON THE MERITS

CITATIONS OF OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 93 F.3d 653 (9th Cir. 1996). (J.A. 22-28). The district court's Minute Order denying summary judgment is unreported. (J.A. 21).

GROUNDS FOR JURISDICTION

The decision of the Court of Appeals for the Ninth Circuit was filed on August 22, 1996. The Petition for Certiorari was filed on November 18, 1996 and was granted on February 24, 1997. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1994).

STATUTORY AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. 42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

2. Wash. Rev. Code § 9A.72.085

(Reproduced verbatim in the Appendix at 5a-6a.)

3. Wash. Rev. Code § 10.37.010

No pleading other than an . . . information shall be required on the part of the state in any criminal proceeding . . . .

(Reproduced verbatim in the Appendix at 4a.)

4. Wash. Rev. Code § 36.27.020

The prosecuting attorney shall:

. . .

(4) Prosecute all criminal . . . actions in which the state . . . may be a party . . . .

. . .

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies . . . .

(Reproduced verbatim in the Appendix at 1a-3a.)

5. Wash. Rev. Code § 36.27.040 (Reproduced verbatim in the Appendix at 7a.)

6. 1909 Wash Laws, Ch. 87 (Reproduced verbatim in the Appendix at 8a.)

7. Washington Constitution Art. I, § 25

Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Adopted 1889.

COURT RULES INVOLVED

1. Washington Criminal Rule 2.1

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .

(Reproduced verbatim in the Appendix at 9a-10a.)

2. Washington Criminal Rule 2.2

(a) Warrant of Arrest. If an . . . information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on the request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. . . . The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(Reproduced verbatim in the Appendix at 11a-13a.)

3. King County, Washington Local Criminal Rule 2.2

(g) Information to Be Supplied to the Court. When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:

. . .

(2) By the prosecuting attorney, insofar as possible.

(A) A brief summary of the alleged facts of the charges;

. . .

(D) Any other facts deemed material to the issue of pretrial release.

(Reproduced verbatim in the Appendix at 14a.)

4. Washington Criminal Rule 3.4

RULE 3.4 PRESENCE OF THE DEFENDANT

(a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules or as excused or excluded by the court for good cause shown.

(b) ....

(Reproduced verbatim in the Appendix at 15a.)

STATEMENT OF THE CASE

This is a damages action brought pursuant to 42 U.S.C. § 1983. Mr. Rodney Fletcher's (respondent's) complaint alleged that King County, Washington, deputy prosecutor Lynne Kalina (petitioner) violated his civil rights when she sought an arrest warrant in initiating a prosecution against him, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. Mr. Fletcher contended that the deputy prosecutor sought the arrest warrant based on facts she knew, or should have known, to be false.[1] The background to Mr. Fletcher's claim follows.

[1] The portions of the Statement of the Case suggesting that deputy prosecutor Kalina filed charges and sought an arrest warrant based on false information are taken from respondent's complaint and are accepted as true only for purposes of her motion to dismiss based on absolute immunity. Ms. Kalina has denied the allegations of wrongdoing. (J.A. 8-10).

On November 30, 1992, the Seattle Police Department referred a completed investigation report on a burglary case to the Office of the King County Prosecuting Attorney. The report alleged that Mr. Fletcher had illegally entered Our Lady of Guadalupe School where he stole money, a computer, two printers and a modem. (J.A. 19). In the course of her routine duties in the Prosecuting Attorney's Filing Unit (J.A. 11), deputy prosecutor Kalina reviewed the report referred by the Seattle Police Department and determined that criminal charges should be filed against Mr. Fletcher. (J.A. 11). Ms. Kalina prepared three pleadings to initiate the prosecution: (1) an Information, charging Mr. Fletcher with burglary in the second degree; (2) a Certification for Determination of Probable Cause ["Certification"]; and (3) a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail ["Motion"].

The Certification, which lies at the heart of Mr. Fletcher's complaint, is a sworn statement summarizing the evidence generated as a result of the police investigation.[2] In the Certification, Ms. Kalina recited, in part, that Mr. Fletcher's fingerprints had been lifted from the crime scene and that he had never been associated with the school. The Certification further recited that an eyewitness had identified Mr. Fletcher from a photo montage as one of the persons who attempted to sell the property stolen from the school. (J.A. 12-20).

Ms. Kalina filed these charging documents with the King County Superior Court on December 14, 1992.

[2] Washington Criminal Rule 2.2(a) requires that an arrest warrant be supported by "sworn testimony establishing the grounds for issuing the warrant." The rule further provides that the court may determine probable cause "based on evidence which is hearsay in whole or in part, subject to constitutional limitations." Under Washington state law, Ms. Kalina's Certification satisfies this requirement. *See* Wash. Rev. Code § 9A.72.085 (1996) (providing, *inter alia*, a certification made under penalty of perjury is the equivalent of an affidavit). *Accord* King County Local Criminal Rule 2.2.

Later that same day, the trial court found probable cause, granted the Motion and ordered that an arrest warrant be issued for Mr. Fletcher. The trial court's order provided that, after booking, he was to be released on his personal recognizance if he promised to appear for arraignment. (J.A. 12, 14-16).

On September 24, 1993, Mr. Fletcher was arrested.[3] (J.A. 6). A few weeks later, Mr. Fletcher's attorney informed the King County Prosecuting Attorney's Office that Mr. Fletcher had previously performed some construction work for Our Lady of Guadalupe School, which could have accounted for his fingerprint being present at the crime scene. In addition, further review by the prosecutor's office revealed that Mr. Fletcher had not been identified by an eyewitness as one of the persons who tried to sell property stolen from the school. In light of these circumstances, on October 26, 1993, the trial court dismissed the charges against Mr. Fletcher upon motion of the prosecuting attorney. (J.A. 5-6).

Procedurally, the manner in which Ms. Kalina initiated the prosecution against Mr. Fletcher is the same as the thousands of other prosecutions initiated each year by the King County Prosecuting Attorney.[4] In Washington state, a prosecuting attorney may initiate felony criminal charges by Information. Wash. Crim. R. 2.1 (App. at 9a); Wash. Rev. Code § 10.37.010 (1996) (App. at 4a).[5]

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[3] Mr. Fletcher spent one day in the King County Jail following his arrest. Although this fact is not contained in the record before this Court, the fact is undisputed.

[4] In 1992, the year charges were filed against Mr. Fletcher, the King County Prosecuting Attorney filed 7,548 felony cases. *Washington State County Criminal Justice Databook 1985-1995* at 86 (Feb. 1996).

[5] As a technical matter, a criminal prosecution may be initiated by indictment. However, the State of Washington abandoned its mandatory grand jury practice some 80 years ago and prosecutions are now initiated by Information. *See* Wash. Const. art. I, § 25; 1909 Wash. Laws, ch. 87; Note, *Felony Information: Due Process and Preliminary Hearing on Probable Cause*, 42 Wash. L. Rev. 903 (1967). This Court approved this procedure in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

A prosecution initiated by Information in Washington state consists of the filing of three pleadings to commence and continue the prosecution. These three pleadings constitute the charging package and are filed simultaneously after the prosecutor has determined that charges are to be filed. (J.A. 12).

The first pleading is the Information, which is a "plain, concise and definite written statement of the essential facts constituting the offense charged" that must be signed by the prosecuting attorney. Wash. Crim. R. 2.1(b) (App. 9a).[6] As a practical matter, the Information in larger counties is generally signed by a deputy prosecutor pursuant to Wash. Rev. Code § 36.27.040, which provides that deputy prosecutors "shall have the same power in all respects as their principal." (App. 7a).

The second pleading is the Certification for Determination of Probable Cause, which is a sworn statement signed by the prosecuting attorney setting forth the essential facts constituting probable cause for charging the defendant. The deputy prosecutor obtains these facts from the completed police investigative reports and summarizes them in the Certification. (J.A. 19-20). This sworn document is attached to the Information and serves as the basis for a judicial determination of probable cause, which is necessary to justify pretrial detention. *See Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that the United States Constitution requires a judicial determination of

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[6] Washington Criminal Rules 2.1 and 2.2 have been amended since the events occurred which gave rise to Mr. Fletcher's case. While relevant sections of the 1994 annual edition of the court rules have been included in the Appendix, the operative provisions of rules 2.1 and 2.2 are identical to those in effect in 1992, the year in which the underlying prosecution was initiated. Although these rules have been amended since 1994, no provision relevant to the proceedings involving Mr. Fletcher has been substantively changed.

probable cause, which can be based on testimony or affidavit, before a suspect can be kept in custody).

The third part of the charging package is a Motion requesting that the court take three interrelated actions: (1) make a finding of probable cause; (2) issue an arrest warrant; and (3) fix bail or release the accused on personal recognizance. The arrest warrant is sought by the prosecutor and issued by the court in order to provide the trial court with personal jurisdiction over the accused.[7] This charging procedure has been developed to comply with Washington law, which imposes a duty on the prosecutor to "institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies. . . ." Wash. Rev. Code § 36.27.020(6) (1996)[8] (App.1a).

This case arose when deputy prosecutor Kalina followed this Washington law, filed burglary charges and sought a warrant for Mr. Fletcher's arrest. It is undisputed that the arrest occurred after criminal charges had been filed and that the application for the arrest warrant was a part of the charging documents submitted to the court.

PROCEEDINGS BELOW

The district court denied deputy prosecutor Kalina's motion for summary judgment by a Minute Order concluding that she was not entitled to absolute prosecutorial immunity. (J.A. 21).

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[7] The Motion for issuance of the arrest warrant shows, on its face, that the arrest is for the purpose of ensuring that the defendant will be available for trial and, if found guilty, for punishment. The Motion provides that the defendant will either be held on bond or released on personal recognizance after promising to appear for arraignment at the scheduled date and time. (J.A. 14-16).

[8] The 1987 version of this statute was in effect at all times relevant to this case. This statute was amended once subsequently, in 1995, in a manner that does not affect these proceedings. *Compare* 1987 Wash. Laws, ch. 202, § 205 *with* 1995 Wash. Laws, ch. 194, § 4.

Deputy prosecutor Kalina took an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit.[9] The court of appeals affirmed the district court and held that a "prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant." *Fletcher v. Kalina*, 93 F.3d 653, 655 (9th Cir. 1996) (J.A. 26-27). The court of appeals found that the deputy prosecutor's actions in signing and filing the declaration for an arrest warrant were virtually identical to the police officer's actions in *Malley v. Briggs*, 475 U.S. 335 (1986), and held that she should, therefore, receive only the qualified immunity granted to the police officer in *Malley*. *Id.* at 656 & n.2 (J.A. 27).

SUMMARY OF ARGUMENT

I. In *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), this Court recognized that prosecutors are absolutely immune from suit under 42 U.S.C. § 1983 to the same extent that they were immune from suit under the common law. As *Imbler* explains, the common law traditionally immunized prosecutors from suit for causing an arrest warrant to issue in connection with the initiation of a prosecution. It follows from *Imbler* that a prosecutor seeking an arrest warrant in connection with filing charges is absolutely immune from liability under § 1983. With the exception of the court of appeals in this case, every court that has considered the issue has read *Imbler* in this fashion.

II. This Court's post-*Imbler* decisions are also consistent with a recognition of absolute immunity for a prosecutor who seeks an arrest warrant as an integral part of the initiation of a prosecution. In deciding whether a particular act of the prosecutor is entitled to absolute immunity, the focus of the inquiry is whether the action

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[9] An order denying a claim of absolute immunity is immediately appealable under the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982).

was taken in the prosecutor's role as an advocate. Here, Ms. Kalina's decision to seek an arrest warrant, and her preparation of the Certification to effectuate that decision, were integral to her role as the state's advocate in the prosecution of Mr. Fletcher. Ms. Kalina's actions bore no functional resemblance to the police officer's conduct in *Malley v. Briggs*, 475 U.S. 335 (1986), where the request for an arrest warrant was not incidental to the quasi-judicial act of initiating a prosecution. Rather, the conduct here was more closely analogous to the prosecutor's conduct in *Burns v. Reed*, 500 U.S. 478 (1991), where this Court found that absolute immunity attached to a prosecutor's actions at a probable cause hearing in support of an application for a search warrant.

III. Compelling policy arguments support recognizing absolute immunity here. Like judges, prosecutors occupy positions in the criminal justice system that make them particularly susceptible to retaliatory lawsuits. The inhibition posed by the specter of entanglement in civil litigation could lead prosecutors to make judgment calls influenced by the risk of potential litigation rather than an assessment of the merits. For example, prosecutors might be reluctant to initiate prosecution of close cases, knowing that they may be exposed to civil litigation if they decide to seek an arrest warrant to ensure that the accused is present for trial. As *Imbler* recognized, the integrity of the judicial process demands a recognition of absolute immunity for the full spectrum of prosecutorial decisions that accompany initiation of a prosecution. Anything less will result in the expenditure of substantial prosecutorial time and energy in defense of civil actions, rather than the fearless pursuit of justice.

ARGUMENT

I. A PROSECUTOR WHO INITIATES A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN SHE APPLIES FOR AN ARREST WARRANT TO ENSURE THAT THE ACCUSED IS AVAILABLE FOR TRIAL AND, IF FOUND GUILTY, FOR PUNISHMENT.

This Court has long recognized that it is a "principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). Relying on *Bradley*, the Court two decades ago recognized that prosecutors are absolutely immune from 42 U.S.C. § 1983 liability for acts "intimately associated with the judicial phase of the criminal process," including conduct in "initiating a prosecution and presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 430, 431 (1976). In so doing, the Court noted the pivotal role the prosecutor plays in the judicial phase of the criminal process:

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby.

Id. at 423 (quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. 1935)). *Imbler* did not limit a prosecutor's absolute immunity to actions taken in the courtroom. Rather, the Court noted that "the duties of the prosecutor in his role as advocate for the state involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," which are likewise entitled to immunity. *Id.* at 431 n.33. *See also Buckley v. Fitzsim-*

mons, 509 U.S. 259, 270 (1993); *Burns v. Reed*, 500 U.S. 478, 486 (1991).

Imbler's recognition of absolute prosecutorial immunity from actions under § 1983 did not spring from the void. Rather, the Court expressly rested its decision "upon a considered inquiry into the immunity historically accorded [prosecutors] at common law and the interests behind it." *Imbler*, 424 U.S. at 421. After reviewing the common law rule of absolute immunity for prosecutors engaged in quasi-judicial functions, the Court concluded that the rule of absolute immunity for prosecutors' acts associated with the judicial phase of the criminal process was "well settled." *Id.* at 424. The Court's decision in *Imbler*, then, can be understood only by considering the common law precedent upon which it relies.

As with this case, *Imbler*'s antecedents involved allegations of prosecutorial wrongdoing in procuring an arrest. In *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896), for example, the plaintiff alleged that the local prosecutor, "*willfully, maliciously, and without probable cause . . . caused a warrant to be issued for the arrest of said plaintiff on said indictment and caused said plaintiff to be arrested thereon . . . .*" *Id.* at 1001 (emphasis added). As this Court noted in *Imbler*, the Indiana Supreme Court dismissed the action on the ground that the prosecutor was absolutely immune, despite allegations of malice. *Imbler*, 424 U.S. at 421.[10] Similarly, in *Yaselli v. Goff*, 12 F.2d

[10] The court in *Griffith* relied on the following passage from John Townshend, Slander and Libel, § 227, at 395-96 (3d ed. 1877), in granting absolute immunity to the prosecutor who caused the arrest:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.

44 N.E. at 1002.

396 (2d Cir. 1926), *aff'd*, 275 U.S. 502 (1927) (per curiam), the complaint alleged that *the prosecutor caused the plaintiff to be arrested by the use of false and misleading evidence.* Noting that *Yaselli* had engaged in an extensive review of the common law tradition of granting immunity,[11] this Court focused on the following passage from the Second Circuit's opinion:

> In our opinion the law requires us to hold that a special assistant to the Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy. The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

Yaselli, 12 F.2d at 406, quoted in *Imbler*, 424 U.S. at 422.[12]

[11] The court in *Yaselli* cited with approval *Watts v. Gerking*, 222 P. 318, 228 P. 135 (Ore. 1924) where, on rehearing, the Oregon court granted absolute immunity to a district attorney who was alleged to have maliciously caused an arrest for an offense he knew had not been committed at all. *Yaselli*, 12 F.2d at 404-05.

[12] As *Imbler* points out, this Court affirmed *Yaselli* in a per curiam opinion, *Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam), on the authority of *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), and *Alzua v. Johnson*, 231 U.S. 106 (1913). *Yaselli*, 275 U.S. at 503.

Griffith and *Yaselli* show that, at common law, a prosecutor was absolutely immune even if the prosecutor willfully and maliciously initiated a prosecution without probable cause, based on false and misleading evidence. Both cases recognize that prosecutors often cause an arrest warrant to issue as an integral part of initiating a prosecution. Thus, because *Imbler* expressly extended the common law's absolute immunity to cases arising under § 1983, it follows that a prosecutor seeking an arrest warrant in connection with filing charges is absolutely immune under § 1983, just as the common law provided.

A majority of the federal appellate courts considering the question have so read *Imbler*.[13] The Tenth Circuit has most recently articulated the basis for this proper application of *Imbler* in *Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997), as follows:

> Finally, the act of obtaining an arrest warrant in conjunction with the filing of a criminal complaint is functionally part of the initiation of a criminal proceeding, and therefore prosecutorial in nature. As this court stated in *Lerwill v. Joslin*.
>
> > [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under *Imbler*.

Roberts, 104 F.3d at 320 (citing *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983) (seeking an arrest warrant is part of initiating a prosecution). Other circuits

[13] *See* discussion *infra* n.14 and accompanying text.

have reached the same correct conclusion based on similar readings of *Imbler*.[14] *See Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (noting that the defendant prosecutor properly claimed absolute immunity with regard to both drafting and authorizing the original criminal complaint and procuring the arrest warrant); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (seeking an arrest warrant in connection with filing charges entitled the prosecutor to absolute immunity); *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990) (prosecutor who performs functions within the continuum of initiating and presenting a criminal case, such as seeking an arrest warrant, is ordinarily entitled to absolute immunity), *cert. denied*, 499 U.S. 976 (1991); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986) (seeking an arrest warrant is part of initiating a prosecution), *cert. denied*, 481 U.S. 1023 (1987).[15]

These courts have appropriately applied *Imbler*. Applying *Imbler* to grant absolute immunity in cases such as this preserves the integrity of the criminal phase of the judicial process and allows prosecutors effectively to discharge their duties in initiating prosecutions, without looking over their shoulders out of concern for civil liability. By contrast, subjecting prosecutors to suit for engaging in the common practice of securing an arrest warrant as part of the initiation of a prosecution would "prevent the vigorous and fearless performance of the prosecutor's duty that is

[14] Further, the Third and Fourth Circuits have analogized seizure warrants obtained in civil forfeiture proceedings to arrest warrants and have granted absolute immunity to prosecutors who make requests for seizure warrants. *See Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991); *Ehrlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990).

[15] In reaching a contrary conclusion, the court below purported to follow the Eighth Circuit's decision in *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993). In fact, the prosecutor's alleged misconduct in *Kohl* occurred during the investigative pre-indictment phase of the judicial process, not as part of the initiation and presentation of a criminal prosecution. As explained below, that fact has dispositive significance.

essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-28.[16]

II. THIS COURT'S POST-*IMBLER* DECISIONS ARE CONSISTENT WITH THE PRINCIPLE THAT A PROSECUTOR INITIATING A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN SHE APPLIES FOR AN ARREST WARRANT, BECAUSE THAT CONDUCT OCCURS IN HER ROLE AS AN ADVOCATE FOR THE STATE.

In the twenty years since *Imbler*, this Court has held that actions of a prosecutor falling within the advocate's role are fully immunized. In other words, the Court has consistently held that a prosecutor is absolutely immune where the prosecutor acts as an advocate for the state in conjunction with the initiation of criminal proceedings. Four years ago, this Court stressed that this principle remained unchanged:

> We have not retreated, however, from the principle that *acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity*. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Buckley, 509 U.S. 259, 273 (1993) (emphasis added).[17]

[16] Furthermore, applying *Imbler* so as to deny absolute immunity for this function would render its protection for a prosecutor almost meaningless. Where the arrest warrant issues as a direct consequence of immunized conduct, it would turn *Imbler* into little more than a pleading rule to allow a civil case to proceed simply because the claim against the prosecutor is one based upon the arrest and not the filing of criminal charges which led to that arrest.

[17] In *Buckley*, the prosecutor was denied absolute immunity for his conduct in staging a press conference and leading an investigation into a highly publicized murder. The investigation was conducted under the joint supervision and direction of the sheriff and prosecutor, whose police officers and assistant prosecutors performed essentially the same investigatory functions. Evidence was fabricated during the investigation, well before a special grand jury was empaneled. The principles underlying *Imbler* led this Court to conclude that "[w]hen the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276. Therefore, the prosecutor was entitled to claim only qualified immunity, as were the police officers. *Id.* This case, however, does not concern Ms. Kalina's investigative conduct nor does it concern conduct similar in function to that of a police officer. *See* discussion *infra* Part II(A)-(C).

This approach to prosecutorial immunity conforms to the general principle that immunities attach to functions, not to people, a point this Court has made repeatedly since *Imbler*. Here, Ms. Kalina filed the Certification in her capacity as an advocate for the State of Washington in conjunction with the initiation of a prosecution. Regardless of the form the Certification took, it was an integral part of the prosecutorial and judicial function, and thus immunized under *Imbler*. Further, a finding of immunity in this case comports with this Court's post-*Imbler* decisions.

A. In Requesting an Arrest Warrant in Conjunction With the Filing of an Information, a Prosecutor Acts as an Advocate for the State and Performs a Traditional Prosecutorial Function.

The functional analysis developed in *Imbler* and employed in *Buckley* recognizes that a number of prosecutorial acts necessarily accompany proper preparation for the judicial phase of the criminal process. *Buckley*, 509 U.S. at 273. Once a prosecutor decides to initiate criminal charges, the prosecutor must ensure that the trial court acquires personal jurisdiction over the accused. Trial *in absentia* is an anathema to fundamental principles of criminal justice, and due process requires that a defendant be present in court for the state to prosecute. *See, e.g., Crosby v. United States*, 506 U.S. 255 (1993), ("It

is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent . . . a conviction will be set aside.") (quoting W. Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918)); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).[18] The issuance of an arrest warrant provides this assurance.

As a result, arrest warrants ordinarily follow as a matter of course from a grand jury indictment. An indictment that is fair upon its face and returned by a properly constituted grand jury conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. *Ex parte United States*, 287 U.S. 241, 250 (1932). A refusal to issue a warrant under such circumstances is "in reality and effect, a refusal to permit the case to come to a hearing upon either questions of law or of fact, and falls little short of a refusal to permit the enforcement of the law." *Id.*

An Information is the functional equivalent of a grand jury indictment. Both charging mechanisms confer subject matter jurisdiction on the trial court. 41 Am. Jur. 2d *Indictment and Information* § 19 (1995). The only distinguishing feature between the two is that an Information is a written accusation of crime filed by a public prosecuting officer without the intervention of a grand jury. *Id.* § 3. Under the information system, the arrest warrant flows from the issuance of the Information and demonstration of probable cause, much like the arrest warrant under the indictment system results from presentation of evidence to a grand jury.

Thus, in seeking an arrest warrant following an indictment or an Information, a prosecutor performs a function intimately related to the prosecutor's role as an advocate for the state. Having used the charging mechanism to give the court subject matter jurisdiction, the prosecutor obtains the arrest warrant in aid of the court's exercise of

[18] *See also* Wash. Crim. R. 3.4; *State v. Jackson*, 878 P.2d 453 (Wash. 1994); *State v. Hammond*, 854 P.2d 637 (Wash. 1993).

personal jurisdiction over the accused.[19] The prosecutor's acts in performing that function are among those that *Buckley* expressly recognized as immunized: "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to the court after the decision to file an Information has been made. *Buckley*, 509 U.S. at 273.

Any impediment to the prosecutor's ability to obtain an arrest warrant following an indictment or other initiation of a prosecution would necessarily impair the functioning of the judicial phase of the criminal process.[20] To impose the specter of entanglement in civil litigation on a prosecutor any time that prosecutor applies for an arrest warrant (whether through a Certification or some other mechanism) as a part of the initiation of a prosecution would raise precisely such an impediment.

B. A Prosecutor Who Initiates Criminal Charges and Seeks an Arrest Warrant Does Not Perform the Same Function as a Police Officer Who Seeks an Arrest Warrant Prior to a Case Being Submitted to the Prosecutor for a Charging Decision.

Deputy prosecutor Kalina's conduct can be distinguished from that of the police officer in *Malley* by comparing the nature of the function each actor performed. The court below found "little, if any, distinction" between the deputy prosecutor's conduct in the case at bar and the police officer's conduct in *Malley*, 475 U.S. at 335. *Fletcher*, 93 F.3d at 656 n.2. Viewing petitioner's conduct in this light, the court of appeals then misapplied the same act/

[19] *See supra* n.18 and *infra* n.26.

[20] In opposing *certiorari*, Mr. Fletcher suggested that Ms. Kalina could have acquired personal jurisdiction over him by issuing a summons, rather than by procuring an arrest warrant. *See* Respondent's Brief in Opposition, at 10 n.5. That argument, however, challenges only the procedure used by the prosecutor to acquire personal jurisdiction. It has no bearing on the *function* of the Certification, given that it was issued *after* the decision had been made to file an Information and in the course of the deputy prosecutor's role as an advocate. *See infra* n.26.

same immunity analysis contained in this Court's opinion in *Buckley*, 509 U.S. at 273. *See Fletcher*, 93 F.3d at 656. But when one compares the functions of the acts at issue, as *Imbler* and its progeny require, deputy prosecutor Kalina's conduct is manifestly distinct from the police officer's conduct in *Malley*.

The relevant inquiry under the functional analysis is on the nature and function of a particular act, not on the act itself. *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (citing *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). Under this approach, the function and not the act should control. Indeed, Justice Kennedy has noted that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions" and that it would not be incongruous for one to receive immunity and the other not. *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part) (arguing for broader immunity for a prosecutor than for a police officer). The flaw in the Ninth Circuit's analysis is that it did not consider the difference in the nature and function of the acts it sought to compare, instead focusing on the act alone.

In the present case, deputy prosecutor Kalina sought an arrest warrant to aid the trial court's exercise of personal jurisdiction over a charged defendant. The police officer in *Malley*, on the other hand, sought an arrest warrant prior to any decision by a prosecutor to seek an indictment or otherwise initiate a criminal prosecution.[21] In arguing for absolute immunity, the police officer in *Malley* asserted that (1) his function in seeking an arrest warrant was similar to that of a complaining witness; or (2) his conduct was similar to that of a prosecutor seeking an

[21] In *Malley*, the police officer was operating in Rhode Island, a state which uses a grand jury to initiate criminal prosecutions. The police officer filed a criminal complaint during the course of his investigation and also sought and obtained an arrest warrant against Briggs. After a grand jury declined to return an indictment, Briggs sued under § 1983. *Malley*, 475 U.S. at 342-43.

indictment. *Malley*, 475 U.S. at 340-41. This Court rejected the police officer's first contention because complaining witnesses were not absolutely immune at common law, but were accorded only a qualified immunity. *Id.* at 340-41 & n.3.[22] As to the officer's second contention, the Court distinguished a police officer, who files a criminal complaint and warrant request, from a prosecuting attorney, who actually makes the charging decision and seeks the indictment. This Court noted that the police officer's act was further removed from the judicial process and therefore not entitled to absolute immunity:

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, *is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment*. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor

[22] In support, *Malley* cited *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, 402 (1852); *Randall v. Henry*, 5 Stew. & P. 367, 378 (Ala. 1834); *Bell v. Keepers*, 14 P. 542 (Kan. 1887); and *Finn v. Frink*, 24 A. 851 (Me. 1892). *Bell v. Keepers* and *Finn v. Frink* are illustrative of that status. In both cases, the "complaining witnesses" were private citizens, not prosecutors, who, believing themselves aggrieved by the conduct of another, filed criminal complaints directly with the trial court, which led to the issuance of warrants. Modernly, the common law status of "complaining witness" has been addressed in the context of a non-prosecutor and has been defined by a number of lower courts as one who causes a baseless criminal prosecuton. *See, e.g., Enlow v. Tishomingo County, Miss.*, 962 F.2d 501, 511 n.29 (5th Cir. 1992); *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 958-59 (2d Cir. 1988).

> seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.

Id. at 342-43 (emphasis added).

The critical distinction between this case and *Malley* is, therefore, the function each actor performs in the criminal justice system. This Court has noted that "[t]he common law has never granted police officers an absolute and unqualified immunity. . . ." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). This Court has recognized that there is an inherent difference between the functions a police officer and a prosecutor perform within the criminal justice system. A prosecutor initiates criminal charges; a police officer does not.

Complaining witnesses such as the police officer in *Malley* were accorded only qualified immunity at common law. *See Malley*, 475 U.S. at 340-41 & n.3. Prosecutors were accorded absolute immunity at common law for initiating a prosecution and presenting the state's case. *Imbler*, 424 U.S. at 423-24. The conclusion to be derived from these two rules is that a public prosecutor who initiates criminal charges and takes steps in furtherance of that prosecution cannot be considered a complaining witness as that term is used in the common law.[23] Any other conclusion would be at odds with

[23] The Court has suggested that the status of complaining witness does not apply to a public prosecutor. In *Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992), it was stated:

> Respondents do not contend that private parties who instituted attachment proceedings and who were subsequently sued for malicious prosecution or abuse of process were entitled to absolute immunity. And with good reason; although public prosecutors and judges were accorded absolute immunity at common law, *Imbler v. Pachtman, supra*, at 421-424, such protection did not extend to complaining witnesses who, like respondents, set the wheels of government in motion by instigating a legal action. *Malley v. Briggs*, 475 U.S. 335, 340-341 (1986) ("In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.").

Imbler. Of course, as *Imbler*, *Malley* and *Buckley* show, when a prosecutor acts outside her role as the state's advocate in initiating a prosecution and presenting the state's case she would receive only such protection as was accorded that function at common law. In this case, the prosecutor did not do so.

Deputy prosecutor Kalina sought the arrest warrant in this case as the means to bring the charged defendant before the court. Seeking the arrest warrant was an integral part of her initiation of the prosecution and was intimately associated with the judicial phase of the criminal process. Contrary to the decision below this case presents a situation vastly different from the situation in *Malley*.

C. Deputy Prosecutor Kalina Is Entitled to Absolute Immunity Under *Burns* Because Her Presentation of a Certification in Support of an Application for an Arrest Warrant to a Judge Was Done in Her Role as Advocate for the State.

In *Burns v. Reed*, this Court granted absolute immunity to a prosecutor who appeared at a probable cause hearing in support of an application for a search warrant. *Burns*, 500 U.S. at 492. This Court reasoned as follows:

> The prosecutor's actions at issue here—appearing before a judge and presenting evidence in support of a motion for a search warrant—clearly involve the prosecutor's "role as advocate for the State," rather than his role as "administrator or investigative officer," the protection for which we reserved judgment in *Imbler*, see *id.*, at 430-431, and n.33. Moreover, since the issuance of a search warrant is unquestionably a judicial act, see *Stump v. Sparkman*, 435 U.S. 349, 363, n.12 (1978), appearing at a probable-cause hearing is "intimately associated with the judicial

> phase of the criminal process." *Imbler, supra,* at 430. It is also connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest, as was the case here.

Id. at 491-92.

The issuance of the arrest warrant in this case was a judicial act. While she did not personally appear in Court when the warrant was issued, deputy prosecutor Kalina's filing of the Certification was an act of presenting evidence to the court in support of issuance of the warrant. There is no significant difference in function between a prosecutor who presents evidence to the court by live testimony and a prosecutor who presents evidence to the court in the form of an affidavit, particularly where the prosecutor controls the flow of information to the court. In both instances the prosecutor is providing the court with the factual basis for a judicial determination of probable cause. As such, Ms. Kalina is entitled to absolute immunity. As this Court noted, such acts taken

> by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor. Therefore, absolute immunity for this function serves the policy of protecting the judicial process, which underlies much of the Court's decision in *Imbler*.

Id. at 492.

The facts of the present case present the same potential for "vexatious litigation." Absolute immunity should be recognized for a prosecutor who applies directly to the court for an arrest warrant to continue the prosecution already initiated.

III. THE POLICY CONSIDERATIONS ENUNCIATED IN *IMBLER* SUPPORT THE PRINCIPLE THAT A PROSECUTOR WHO INITIATES A CRIMINAL PROSECUTION IS ENTITLED TO ABSOLUTE IMMUNITY UNDER *IMBLER* WHEN THAT PROSECUTOR APPLIES FOR AN ARREST WARRANT TO ENSURE THAT THE DEFENDANT IS AVAILABLE FOR TRIAL AND, IF FOUND GUILTY, FOR PUNISHMENT.

A. The Loss of Absolute Immunity Will Have a Chilling Effect on Prosecutors in the Administration of Justice.

Imbler recognized that fear of potential entanglement in civil litigation would undermine prosecutors' performance of their duties. Conscious of the possibility of a civil suit, a prosecutor might make decisions influenced by the risk of potential litigation.[24] Further, the fear of entanglement in civil litigation would divert energy and attention from the pressing duty of enforcing the criminal law:

> There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial

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[24] As this Court noted in *Imbler*, 424 U.S. at 427 n.24:

> A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.
>
> On the other hand, a prosecutor should feel free to dismiss a case in the interests of justice (as the prosecutor did here) without fear that the decision will be the springboard for a later claim.

> policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

Imbler, 424 U.S. at 424-25. It is for this reason that absolute rather than qualified immunity was accorded to prosecutors for their acts undertaken in connection with the initiation of criminal charges:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of a common law suit for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.

Id.

Petitioner's conduct in this case is fully within the function of the initiation of a prosecution under *Imbler*. As such, absolute rather than qualified immunity must attach.

B. Qualified Immunity Is Insufficient to Preserve the Integrity of the Judicial Process When a Prosecutor Seeks an Arrest Warrant as an Integral Part of the Filing of Criminal Charges.

Included among the primary statutory functions of a prosecuting attorney in Washington state are the duties to "[p]rosecute all criminal . . . actions in which the state . . . may be a party . . ." and to "[i]nstitute and prosecute proceedings before magistrates for the arrest

of persons charged with or reasonably suspected of felonies." Wash. Rev. Code § 36.27.020(4), (6) (App. 1a). As this Court recognized in *Imbler*:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Imbler, 424 U.S. at 425. Stripping the cloak of absolute immunity from a function delegated by the legislature to the prosecutor, which is integral to the initiation of a prosecution, would directly conflict with the principles enunciated in *Imbler*.[25]

In any prosecution initiated in furtherance of a prosecutor's statutory duty, questions will arise that require the

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[25] In *Yaselli*, the Second Circuit Court of Appeals also described the paramount importance of granting absolute immunity under these circumstances:

> Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal, but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages.

Yaselli, 12 F.2d at 402 (quoting 2 Thomas M. Cooley, Law of Torts at 795 (3d ed. 1926)).

exercise of prosecutorial discretion. Resolution of these questions necessarily involves a critical evaluation of the evidence and consideration of the strategies best suited to a successful prosecution. One of those considerations is whether or not to seek an arrest warrant to compel the defendant to appear before the court.[26] Granting only qualified immunity to these prosecutorial decision-making functions would result in "a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Id.* at 425. The burdens imposed on the prosecutor by this potential entanglement in civil litigation can only result in the impairment of the judicial phase of the criminal process by deflecting the prosecutor's attention away from his or her duty of enforcing the criminal law.

A prosecutor's decisions whether to seek an arrest warrant and, if so, how to present the supporting evidence for the warrant in a Certification can be easily questioned with the benefit of hindsight. A grant of qualified im-

[26] Respondent has suggested that a summons can issue in lieu of an arrest warrant to ensure the defendant's presence for trial. *See* Respondent's Brief in Opposition at 10 n.5. The actual presence of the defendant is essential to the operation of the judicial process because trial ordinarily cannot proceed without the defendant. *Crosby v. United States*, 506 U.S. 255. One of the discretionary decisions a prosecutor must make is whether to seek an arrest warrant or to rely merely upon a summons. It is generally recognized that the burden is on the prosecutor to ensure that the defendant is available for trial and, if found guilty, for punishment. *Roberts*, 104 F.3d at 320 (citing *Lerwill*, 712 F.2d at 437-38) ("Without the presence of the accused, the initiation of a prosecution would be futile.") Washington follows this practice. Wash. Rev. Code 36.27.020(4), (6) (1996). *See, e.g., State v. Stewart*, 922 P.2d 1356 (Wash. 1996), *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *see also* Brief of Amici Curiae Thirty-nine Washington State Counties in Support of Petition for Writ of Certiorari, at 2-3. Under this Court's functional analysis of immunity, the prosecutor's exposure should not turn on which procedure the prosecutor decides to use in order to bring the defendant before the court. As a practical matter, a mere summons would be ineffective in most felony prosecutions, to ensure the defendant's presence for trial, or allow the court to make other informed decisions.

munity would require that those decision-making functions be submitted to the crucible of the civil litigation process before the prosecutor's entitlement to immunity can be determined. The costs inherent in that process, in addition to the obvious chilling effect, include "the expense of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Given the thousands of prosecutions annually for which modern-day prosecutors are responsible, requiring them to submit to the civil litigation process for making decisions to seek arrest warrants as part of initiating prosecutions, would impose "unique and intolerable burdens" not only on the individual prosecutor, but on society as well. *See Imbler*, 424 U.S. at 425-26. Moreover, this Court has observed in *Imbler* that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers" and "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Imbler*, 424 U.S. at 429.

Ms. Kalina's conduct in this case should be entitled to the protection of absolute immunity in accordance with long standing principles recognized by this Court in *Imbler* and its progeny.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court reverse the decision of the Court of Appeals for the Ninth Circuit and the decision of the district court below and remand this matter to the trial court for entry of a judgment of dismissal.

Respectfully submitted,

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April 25, 1997

APPENDIX

APPENDIX

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs.

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all cost bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assessor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commissioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.

WASHINGTON REVISED CODE 9A.72.085

Matters in official proceeding required to be supported, etc., by sworn statement, etc., may be supported, etc., by unsworn written statement, etc.—Requirements of unsworn statement, form

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

(1) Recites that it is certified or declared by the person to be true under penalty of perjury;

(2) Is subscribed by the person;

(3) States the date and place of its execution; and

(4) States that it is so certified or declared under the laws of the state of Washington.

The certification or declaration may be in substantially the following form:

> "I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":
>
> ....
>
> (Date and Place) (Signature)

This section does not apply to writings requiring an acknowledgement, depositions, oaths of office, or oaths required to be taken before a special official other than a notary public.

Enacted by Laws 1981, ch. 187, § 3.

WASHINGTON REVISED CODE 36.27.040

Appointment of deputies—Special and temporary deputies

The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he has been engaged by the prosecuting attorney. The prosecuting attorney shall be responsible for the acts of his deputies and may revoke appointments at will.

Two or more prosecuting attorneys may agree that one or more deputies for any one of them may serve temporarily as deputy for any other of them on terms respecting compensation which are acceptable to said prosecuting attorneys. Any such deputy thus serving shall have the same power in all respects as if he were serving permanently.

The provisions of chapter 39.34 RCW shall not apply to such agreements.

Enacted by Laws 1963, ch. 4, § 36.27.040, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 2, eff. May 6, 1975.

1909 WASH. LAWS, CH. 87

PERMITTING ALL OFFENSES TO BE PROSECUTED BY INFORMATION

AN ACT to amend section 6802 of Ballinger's Annotated Codes and Statutes of Washington, relating to the prosecution of crimes by information.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 6802 of Ballinger's Annotated Codes and Statutes of Washington be and the same hereby is amended to read as follows: Sec. 6802. All public offenses may be prosecuted in the superior courts by information.

Passed by the Senate March 3, 1909.

Passed by the House March 10, 1909.

Approved March 11, 1909.

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(b) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(c) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(d) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(e) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(f) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the pros-

ecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest must be supported by an affidavit or affidavits or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The court must determine that there is probable cause before issuing the warrant. The finding of probable cause may be based on evidence which is hearsay in whole or in part, subject to constitutional limitations.

(b) Issuance of Summons in Lieu of Warrant.

(1) *Generally*. If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue*. If the indictment or information charges only the commission of a misdemeanor or a gross misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons*. A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the

defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall,

on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

[Amended effective September 1, 1983; September 1, 1986]

KING COUNTY, WASHINGTON LOCAL CRIMINAL RULE 2.2

WARRANT UPON INDICTMENT OR INFORMATION

(b) Issuance of Summons in Lieu of Warrant.

(1) *When Summons Must Issue.* Absent a showing of cause for issuance of a warrant, a summons shall issue for a person who has been released by a magistrate on the preliminary appearance calendar. The person shall be directed to appear on the arraignment calendar one week after the date of his/her release.

(g) Information to Be Supplied to the Court. When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:

(1) The pretrial release interview form, completed by either a bail interviewer or by the defense counsel.

(2) By the prosecuting attorney, insofar as possible.

(A) A brief summary of the alleged facts of the charge;

(B) Information concerning other known pending or potential charges;

(C) A summary of any known criminal record;

(D) Any other facts deemed material to the issue of pretrial release.

(3) Any ruling of a magistrate at a preliminary appearance.

[Effective September 1, 1976]

WASHINGTON CRIMINAL RULE 3.4

PRESENCE OF THE DEFENDANT

(a) When Necessary. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.

(b) Effect of Voluntary Absence. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

(c) Defendant Not Present. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served as a warrant of arrest in other cases.

[Effective July 1, 1967]

(12)

No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

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43 pp

QUESTION PRESENTED

Whether a prosecutor who acts as the complaining witness whose oath supports issuance of an arrest warrant is entitled to absolute, rather than qualified, immunity from suit under 42 U.S.C. §1983?

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States, which provides in part:

> The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation. . . .

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of . . . liberty . . . without due process of law.

STATEMENT OF THE CASE

This is a civil rights case brought under 42 U.S.C. §1983 by Respondent Rodney Fletcher against Petitioner Lynne Kalina. Mr. Fletcher's claim is that, by making false statements in an affidavit supporting a warrant for his arrest, Ms. Kalina caused him to be deprived of rights guaranteed by the Fourth and Fourteenth Amendments. *See* Complaint ¶5.1, JA 6. Ms. Kalina claims that she is absolutely immune from suit for such conduct by virtue of her position as a Deputy Prosecuting Attorney. Answer, JA 10. The courts below unanimously rejected the claim of absolute immunity. *See* Order, JA 21; *Fletcher*

v. Kalina, 93 F.3d 653 (9th Cir. 1996), JA 23-4. Ms. Kalina then petitioned this Court for certiorari.

1. The Respondent's Claim.

Rodney Fletcher's Complaint against Lynne Kalina was specific. It focused exclusively on Ms. Kalina's false declaration in support of the warrant for Mr. Fletcher's arrest. Its factual allegations, which are uncontested for purposes of this review, read as follows:

> 3.2 On or about December 14, 1992, Lynne Kalina prepared and filed a Certification for Determination of Probable Cause ("Certification"). . . .
>
> 3.3 In the Certification, defendant Lynne Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution.
>
> 3.4 In the Certification, defendant Lynne Kalina falsely accused Mr. Fletcher of breaking into the Our Lady of Guadalupe School in King County, Washington, and of committing certain acts while within the school, including damaging a vending machine and stealing property.
>
> 3.5 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher had never been associated with the school and did not have permission to enter the school. In fact, Mr. Fletcher had been hired to install partitions and had performed extensive work, at and for the school, was known to the school personnel and was authorized to enter onto the premises.
>
> 3.6 In the Certification, Ms. Kalina falsely stated that Mr. Fletcher was identified from a photo montage by an eye witness. In fact, two eye witnesses failed to identify Mr. Fletcher from the photo montage and no witness identified him. These failed photo identifications were detailed specifically in the Seattle Police Department reports and statements that were available to Ms. Kalina at the time that she prepared the Certification.
>
> 3.7 Pursuant to the recitations in the Certification, an arrest warrant was issued for Rodney Fletcher and on September 24, 1993, Mr. Fletcher was arrested on a charge of Burglary in the Second Degree.

Complaint, JA 5-6. Mr. Fletcher's legal contention was that, by these actions, Ms. Kalina caused him to be denied "the right to be free from unreasonable seizures and from deprivation of liberty, without due process of the law, guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States. . . . " JA 6.

2. The Petitioner's Defense.

Petitioner Kalina's answer denied the main factual allegations in Mr. Fletcher's complaint, and demanded a jury trial on them. JA 8-9. In addition, as affirmative defenses, Ms. Kalina alleged that she was "immune from suit based on the doctrine of absolute prosecutorial immunity" and, in the alternative, that she had "acted in good faith in the performance of her duty and is therefore qualified[ly] immune." JA 10.

Shortly after her answer was filed, and before any discovery was done, Ms. Kalina filed a motion for summary judgment on her claim of absolute immunity. The

motion was supported by an affidavit which did not contest any of the factual allegations in Mr. Fletcher's complaint, but described the sequence of events leading to the issuance of the warrant for Mr. Fletcher's arrest. JA 11-12. In this affidavit, Ms. Kalina acknowledged that she had prepared and signed the certification on which the warrant for Mr. Fletcher's arrest was issued, before any charges were actually filed against him. JA 12. She said she later filed the certification, along with an Information charging Mr. Fletcher with second degree burglary, and a motion and proposed order to issue a warrant for his arrest. JA 12-20.

Ms. Kalina "did not personally appear in court when the warrant was issued". Pet. Brief 24. However, she claimed absolute prosecutorial immunity from Mr. Fletcher's claim because

> the filing of the information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

JA 12. She did not explain why she decided to act as the affiant for the arrest warrant,[1] or why she swore to the falsehoods her affidavit contained.

[1] Attached to Ms. Kalina's affidavit was, among other documents, a sworn police report which apparently was filed along with the arrest warrant application. *See* JA 17. This police report, the contents of which did not support probable cause, was signed under penalty of perjury under RCW 9A.72.085, as was Ms. Kalina's probable cause certification (JA 20).

3. The Decisions Below.

The District Court denied Ms. Kalina's motion, holding her actions were not covered by her absolute immunity. JA 21. Ms. Kalina appealed interlocutorily, and the Court of Appeals unanimously affirmed, holding she was "not immune for her actions in filing a declaration for an arrest warrant," but "emphasiz[ing] that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known." JA 28.

SUMMARY OF ARGUMENT

This Court's decisions establish a presumption in favor of granting state officials qualified immunity, rather than absolute immunity, from suits for violations of civil rights. Petitioner and her *amici* would have the Court ignore that presumption and extend absolute immunity to officials who act as complaining witnesses providing the "oath or affirmation" supporting an arrest warrant – but only when those officials are public prosecutors or their investigators. To do that would be contrary to this Court's prior decisions, to the historical and common law basis for allowing prosecutors immunity from civil rights lawsuits, and to sound policy.

1. As the courts below held, this case is controlled by *Malley v. Briggs*, 475 U.S. 335 (1986) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

Malley held that a police officer who did exactly what Petitioner did – caused a person to be seized by submitting a

sworn statement in support of a complaint and request for an arrest warrant – was entitled to qualified, rather than absolute, immunity. In so holding, the Court applied a "functional approach" which focuses on the nature of the function that caused the alleged violation, rather than the status of the person who performed it.

The function performed by the Petitioner in this case (and in *Malley*) was an ancient one – the function of a complaining witness providing the "oath or affirmation" required by the Fourth Amendment for issuance of a warrant of arrest. It was Petitioner's oath that caused Mr. Fletcher's wrongful arrest. Without an oath, for all her advocacy, she could cause no warrant to issue. At common law, in 1871 and long before, it was well established that persons who provided such an oath could be sued for doing so falsely or maliciously and without probable cause.

The courts below properly held, in light of *Malley* and this common law history, that a higher level of immunity could not be accorded a defendant solely because she is employed as a deputy prosecuting attorney. They were fortified in that position by *Buckley*, which denied a prosecutor absolute immunity for conduct that also closely resembles that for which Petitioner was sued: fabricating evidence to support yet unfiled charges. Their decisions correctly applied these controlling precedents.

2. Petitioner seeks to avoid this conclusion by subtly modifying this Court's "functional approach" to absolute immunity claims. That approach focuses on the conduct for which the defendant has been sued, rather

than the role in which the defendant performed it. Petitioner would have the Court change that approach to focus on the "function of the function," the purpose for which the defendant took the challenged action.

This modification has already been rejected by this Court. It would make the immunity issue turn on the defendant's status, or her intentions, rather than the conduct by which she caused the alleged civil rights violation. To make the outcome turn on status would be to discard the functional analysis. To make the issue turn on the defendant's intentions would run contrary to the nature and purpose of absolute immunity. Moreover, even if the issues were made to turn on the defendants' intentions, it would make no difference here, for Petitioner's intentions were exactly the same as the defendant in *Malley v. Briggs*: to get a warrant to seize and bring to court a person she was accusing of a crime.

3. To the extent these circumstances present a conflict between two longstanding general principles – complaining witnesses can be sued but prosecutors are immune – the conflict is appropriately resolved in favor of the former, older rule, which was the law in 1871 and well before. In reality, however, there is no conflict. Swearing on oath as a complaining witness on an arrest warrant is not traditionally a prosecutor's function. It is not "advocacy" and it is not "judicial." It is not part of a prosecutor's job in most jurisdictions, and is not even a prosecutorial function under the law of the State of Washington. It does not resemble the discretionary functions for which prosecutors are given special protection from civil rights suits, and should not be included among

them. The function of a witness is to tell the truth, not to exercise discretion.

4. There is no compelling reason to expand the scope of absolute immunity to cover prosecutors who take on the role of complaining witnesses. Prosecutors need not perform this function. If they choose to have defendants arrested (rather than haled into court by summons, which implicates no constitutional right) they can easily, and more accurately, support their requests for arrest warrants with affidavits from police officers. If they choose nonetheless to provide the required oath for an arrest warrant themselves, they are adequately protected by the same qualified immunity that covers police officers who do the same thing. Prosecutors who act responsibly should rarely, if ever, face lawsuits for that conduct; and those few suits that are brought can be easily resolved, as the factual and legal issues they present will be narrow. Concern about such lawsuits should cause little distraction to prosecutors who elect to perform a function that (at least theoretically) exposes them to professional discipline, and even prosecution, for willful malfeasance.

Permitting prosecutors to cause arrests based on no "oath or affirmation" but their own, and then cloaking their abuses of that power with absolute immunity, would leave innocent citizens like Rodney Fletcher without any legal remedy, even for the most egregious official misconduct. The law has never allowed that and should not be changed to allow it now.

ARGUMENT

I. THERE IS A PRESUMPTION IN FAVOR OF QUALIFIED IMMUNITY AND AGAINST ABSOLUTE IMMUNITY FOR OFFICIALS WHO VIOLATE CIVIL RIGHTS.

The precedential framework in which this case arises was well described by the opinion of the Court in *Buckley v. Fitzsimmons*, 509 U.S. 259, 267-69 (1993):

> The principles applied to determine the scope of immunity for state officials sued under Rev.Stat. §1979, as amended, 42 U.S.C. §1983 are by now familiar. Section 1983, on its face admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951), however, we held that Congress did not intend §1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when §1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them. *Pierson v. Ray*, 386 U.S. 547, 554-555, 87 S.Ct. 1213, 1217-1218, 18 L.Ed.2d 288 (1967). *See also Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258, 101 S.Ct. 2748, 2755, 69 L.Ed.2d 616 (1981). Although we have found immunities in §1983 that do not appear on the face of the statute, "[w]e do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-923, 104 S.Ct. 2820, 2826, 81 L.Ed.2d 758 (1984). "[O]ur role is to interpret the intent of Congress in enacting

§1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

Since *Tenney*, we have recognized two kinds of immunities under §1983. Most public officials are entitled only to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1982); *Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2911, 57 L.Ed.2d 895 (1978). Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S., at 818, 102 S.Ct., at 2738. In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S., at 506, 98 S.Ct., at 2911.

We have recognized, however, that some officials perform "special functions" which, because of their similarity to functions that would have been immune when Congress enacted §1983, deserve absolute protection from damages liability. *Id.*, at 508, 98 S.Ct., at 2911. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns v. Reed*, 500 U.S., at 486, 111 S.Ct., at 1939; *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432, and n. 4, 113 S.Ct. 2167, ___, and n. 4, 124 L.Ed.2d 391 (1993). Even when we can identify a common-law tradition of absolute immunity for a

> given function, we have considered "whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions." *Tower v. Glover*, 467 U.S., at 920, 104 S.Ct., at 2825. Not surprisingly, we have been "quite sparing" in recognizing absolute immunity for state actors in this context. *Forrester v. White*, 484 U.S. 219, 224, 108 S.Ct. 538, 542, 98 L.Ed.2d 555 (1988).

See also Wyatt v. Cole, 504 U.S. 158, 163-64 (1992).

"The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. at 486-87 (internal quotation marks and citations omitted). That presumption can be overcome only by a showing by the official defendant that the conduct for which he seeks immunity would have been privileged at common law in 1871, and that a grant of immunity would be consistent with the purposes of §1983. "Thus, if application of the principle is unclear, the defendant simply loses." *Buckley v. Fitzsimmons*, 509 U.S. at 281 (concurring opinion of Justice Scalia).

Petitioner has failed utterly to overcome this presumption.

II. PETITIONER WAS SUED FOR MAKING FALSE STATEMENTS AS A COMPLAINING WITNESS ON AN ARREST WARRANT AFFIDAVIT, NOT FOR PERFORMING A PROSECUTORIAL FUNCTION.

"In determining whether particular actions of government officials fit within a common-law tradition of

absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' *see, e.g., Burns*, 500 U.S., at 486, 111 S.Ct., at 1939, which looks to 'the nature of the function performed, not the identity of the actor who performed it,' *Forrester v. White*, 484 U.S., at 229, 108 S.Ct., at 545." *Buckley v. Fitzsimmons*, 509 U.S. at 269.

Petitioner Kalina performed more than one function with respect to Rodney Fletcher's prosecution and arrest.[2] One of her functions was clearly prosecutorial: preparing and signing the Information by which Mr. Fletcher was charged. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1996). That was not the function for which Mr. Fletcher sued her, however; his Complaint contains no allegations of misconduct with respect to the filing of the charges against him. *See* Complaint, JA 4-6. Petitioner Kalina was "sued under §1983 for false arrest," *Malley v. Briggs*, 475 U.S. at 340, not for malicious prosecution.

Nor does Mr. Fletcher's Complaint allege that Ms. Kalina acted improperly in requesting a warrant for his arrest. It was not the request for a warrant that caused Mr. Fletcher's arrest – for if that request had been made without Ms. Kalina's false sworn statements, it would have been denied, for the court could not have found probable cause. *See Giordenello v. United States*, 357 U.S. 480, 485 (1958); *State v. Klinker*, 85 Wn.2d 509, 517, 537 P.2d 268 (1975). Mr. Fletcher's Complaint thus focuses on this one aspect of Petitioner Kalina's conduct – the fact

[2] A prosecutor may perform more than one function in a single case, some covered by qualified immunity and others not. *Burns v. Reed*, 500 U.S. 478, 492 (1991).

that she made false statements under oath to cause his arrest, JA 5-6 – because that is what harmed him. It was with regard to this function, and this function only, the courts below rejected Ms. Kalina's claim of absolute immunity: "we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant."[3] It is with regard to this function, not the varieties of true prosecutorial conduct to which the Briefs of Petitioner and her *amici* repeatedly refer,[4] this case should be decided.

[3] JA 26; *see also* JA 27 ("Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*."); JA 23 ("whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity"); JA 28 ("Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant.").

[4] Petitioner's formulation of the Question Presented, which refers generically to "the prosecutor's conduct in causing an arrest warrant to issue" (Pet. Brief i), reflects her discomfort in discussing the specific form of "conduct" to which this lawsuit and the decisions below were limited. The formulations by most of her *amici* similarly obscure the issue, *see* Brief of the National District Attorneys Association at i ("conduct in the function of obtaining an arrest warrant"), Brief of the National Association of Counties, Etc., at i ("conduct in seeking an arrest warrant"), or attempt to completely change the subject, *see* Brief of the United States as Amicus Curiae at I ("requesting the issuance of an arrest warrant"). Petitioner's arguments similarly steer away from the specific conduct involved here, and toward more general, prosecutorial activities such as "Requesting an Arrest Warrant in Conjunction with the Filing of an Information," "Initiat[ing] Criminal Charges and Seek[ing] an Arrest Warrant," and "Appl[ying] for an Arrest Warrant to Insure that the Defendant is Available for Trial." Pet. Brief iv.

A. A Functional Analysis Focuses on the Nature of the Challenged Conduct, Not its Purpose.

Petitioner's evasions regarding the function for which she was sued reflect the central problem with her position in this appeal: "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." JA 27. Since "it is the nature of the function performed, not the identity of the actor who perform[s] it, that inform[s] [the Court's] immunity analysis," *Burns v. Reed*, 500 U.S. at 506 (concurring and dissenting opinion of Justice Scalia), *quoting Forrester v. White*, 484 U.S. 219, 229 (1988), *Malley* controls this case unless Ms. Kalina's function can somehow be distinguished from Officer Malley's.

Petitioner attempts to do this by asking this Court to add a step to its "functional analysis" of immunity issues, a step that would focus on "the nature and function of a particular act, not on the act itself." Pet. Brief at 20. Rather than looking to "the function" of the *act*, Petitioner's test would look to "the function each *actor* performs in the criminal justice system." *Id.* at 22 (emphasis added).

This Court has previously rejected this argument. *Buckley v. Fitzsimmons, supra*. It has consistently held that the scope of absolute immunity under §1983 depends on "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S.

219, 229 (1988).[5] Its "functional approach" focuses on "conduct,"[6] not position or intent. Shifting the focus from the function itself to the "function of the function" would eviscerate functional analysis.

Focusing not on the conduct but on the actor's intentions in engaging in it would undermine the very purpose of absolute immunity – avoiding inquiry into the actor's subjective intentions. *See Mirales v. Waco*, 502 U.S. at 11; *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). If a prosecutor is immune when she swears out an affidavit for an arrest warrant "to aid the trial court's exercise of personal jurisdiction over a charged defendant" (Pet. Brief 20), what if it is alleged that was not her purpose? What if it is claimed that her purpose was to harass the

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[5] *See Burns v. Reed*, 500 U.S. at 495 (denying absolute immunity to prosecutor performing function for which police officers receive only qualified immunity); *Buckley v. Fitzsimmons*, 509 U.S. at 273 ("[T]he actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. . . . When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.").

[6] *Buckley v. Fitzsimmons*, 509 U.S. at 271, 272. *See id.* at 270 (discussing *Imbler v. Pachtman*, regarding "initiating a prosecution and presenting the state's case," and *Burns v. Reed* regarding "giving legal advice to the police"); *id.* at 271 (quoting *Burns* regarding "appearing before a judge and presenting evidence"); *see also, e.g., Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 434 (1993) ("producing a 'verbatim' transcript of each session of the court"); *Mirales v. Waco*, 502 U.S. 9, 13 (1991) ("directing police officers to bring counsel to court"); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) ("approv[ing] petitions relating to the affairs of minors").

person arrested, or to penalize him for refusing to cooperate with the government, or to squeeze a confession from him, or to permit police to conduct a warrantless search of his person, or to settle some private score with him? Either the court must conclusively presume that, because the act was done by a prosecutor (rather than a police officer)[7] its purpose is always proper and "judicial" (thereby making the issue turn on "the identity of the actor") or it must permit inquiry into actual subjective motivation, making the immunity no longer absolute.

Conversely, what if the prosecutor alleges that her purpose in engaging in conduct that is *not* protected by absolute immunity – holding a postindictment press conference, for example – was to aid in the defendant's apprehension to bring him before the court, or to attract the attention of potential witnesses, or to inform victims of the crime about developments in the case? In *Buckley v. Fitzsimmons*, this Court did not let such subjective arguments overcome the fact that the act of making out-of-court press statements is not inherently prosecutorial, and was not protected at common law. 509 U.S. at 276-77. It should not do so here. Converting the "functional approach" into an inquiry into motive or purpose would make it totally unworkable.

Moreover, a subjective inquiry would not aid Petitioner's case, for there is no difference between the function or purpose of Ms. Kalina's warrant request and

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[7] Additionally, of course, making the test for immunity turn on "purpose" would beg the converse question of why absolute immunity would not extend to police officers, or others, if their intent was "prosecutorial". *See* page 17, below.

Officer Malley's. As the Court of Appeals observed, Ms. Kalina filed her arrest warrant affidavit along with a felony information; Officer Malley filed his along with a felony complaint. JA 27 n.2. The purpose of both actions was to bring the arrested person under court jurisdiction. *See Malley v. Briggs*, 475 U.S. at 337. Indeed, no other purpose could be claimed: except in unusual circumstances not presented here, arrests are justified only in order to bring a person believed to have committed a crime before the court to face charges. "Arrests for investigation" are as illegal in Washington as they are elsewhere.[8] All arrest warrants in Washington, whether obtained by police or by prosecutors, "command the defendant be arrested and brought forthwith before the court issuing the warrant." Washington CrR 2.2(c).[9] Thus, even if the "purpose" or "function" of an arrest were controlling, there is no difference between this case and *Malley*.

Malley differs from this case only in that the affiant whose oath supported the arrest warrant was a deputy

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[8] *State v. Ellison*, 77 Wn.2d 874, 877, 467 P.2d 839 (1970); *see Bowling v. United States*, 350 F.2d 1002, 1003 (D.C. Cir. 1965); *Gatlin v. United States*, 326 F.2d 666, 670-71 (D.C. Cir. 1963); *Simpson v. United States*, 346 F.2d 291, 293 (10th Cir. 1965).

[9] *Accord*, Washington Crim. Rule for Courts of Limited Jurisdiction 2.2(c). *See also* RCW 10.31.030 (requiring an officer making an arrest under warrant to take the arrested "person directly and without delay before a judge or before an officer authorized to take the recognizance. . . . "). Even persons arrested without warrants must be taken to court as soon as practicable. *See* Wash. CrR 3.2B(a)(1); Wash. CrRLJ 3.2.1; *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

prosecuting attorney rather than a police officer. JA 27.[10] Because that does not change the analysis, Petitioner's claim of absolute immunity must be rejected, just as was Officer Malley's.

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[10] Neither can *Malley* sensibly be distinguished from this case on the ground that *Malley* involved conduct occurring prior to the "judicial phase" of the case, as Petitioner and some of her amici alternatively suggest. *See* Pet. Brief 18-19; Brief of Maryland et al. at 4-5. For one thing, the idea that there is such a conclusive demarcation was squarely rejected in *Buckley*, by the Court's unanimous denial of absolute immunity to postindictment press statements. *Buckley v. Fitzsimmons*, 509 U.S. 278, 279, 282. Moreover, both this case and *Malley* sit right on the line, not on one side of it or the other. Officer Malley, just like Ms. Kalina, submitted an affidavit and other documents to a judge, who signed the arrest warrant. *Malley v. Briggs*, 475 U.S. at 335. Officer Malley's other documents included "felony complaints"; Ms. Kalina's included an Information. There may (or may not) be a difference between those species of documents with respect to the Sixth Amendment question of whether a "criminal prosecution" had begun; but there is none which affects the Fourth Amendment right to a warrant and probable cause. *Gerstein v. Pugh*, 420 U.S. 103 (1975). Nor can it make a difference that Ms. Kalina made a "prosecutorial" determination of probable cause (as opposed to Officer Malley's police determination). *See* Pet. Br. 21-22. To so contend ignores the Fourth Amendment's requirement of warrants issued by neutral magistrates rather than prosecutors, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *State v. Klinker*, 84 Wn.2d 516-19. It also runs contrary to the sensible common law rule that immunities cannot be conferred on oneself by one's own legal advice. *Epstein v. Berkowsky*, 64 Ill. App. 498 (1896).

B. Swearing Out Arrest Warrant Affidavits is not a Prosecutorial Function.

This Court has heretofore granted absolute immunity only to purely prosecutorial functions such as "initiating a prosecution and in presenting the State's case," *Imbler v. Pachtman*, 424 U.S. at 431, or "appearing before a judge and presenting evidence" from law enforcement officers in a hearing on an application for a search warrant, *Burns v. Reed*, 500 U.S. at 491. "Those actions clearly involve the prosecutor's role as advocate for the State. . . . " *Ibid.*

Swearing to facts in an arrest warrant affidavit is neither advocacy nor a traditional prosecutorial function. Even with the greatly expanded power and prerogative most jurisdictions give prosecutors in modern practice, prosecutors generally do not take on the role of complaining witnesses. Washington prosecutors' common, informal practice of taking this role appears to be a historical and professional aberration. Providing oaths for warrants does not appear in descriptions of the function of the office of public prosecutor.[11] As the Solicitor General's Brief acknowledges, "federal prosecutors typically do not personally attest to the facts in . . . an affidavit filed in support of an application for an arrest warrant. . . . " Brief of the United States as Amicus Curiae at 7. Neither do prosecutors in most other states, as far as we can determine.[12]

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[11] *See, e.g.*, Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. LAW & CRIMINOLOGY 717, 728-763 (1996); ABA Standards for Criminal Justice, *The Prosecution Function* (3d ed. 1993).

[12] Our own informal (and admittedly incomplete) survey has identified only one other state – Nebraska – where prosecutors routinely take on this role. If there were many

This function is not even officially assigned to prosecutors by Washington law. Ms. Kalina's "Certification" was submitted pursuant to Washington Criminal Rule 2.2(a), which does not require, or even suggest, that the "complainant" whose oath must support an arrest warrant should be a prosecutor.[13] As the panel opinion noted, under Washington law the certification could as easily have been signed by "a police officer or complaining witness".[14] In fact, ironically, Ms. Kalina's certification was accompanied by a sworn police report (JA 17); but that police report did not make out probable cause, because, unlike Ms. Kalina's certification, it did not misstate facts.

The law does not assign the role of complaining witness to prosecutors because the role of a witness is to tell the truth, not to advocate. Washington law is consistent with this: contrary to Petitioner's characterization, it does not consider sworn statements "pleadings",[15] and

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others, we assume that would have been mentioned in one of the briefs of Petitioner's many prosecutor/*amici*.

[13] Even King County Local Rule 2.2, which Petitioner cites (Pet. Brief 5) does not equate the prosecutor's summary of the facts with a warrant affidavit, or require that it be sworn. *See* Pet. Brief 14a.

[14] JA 27. The panel consisted of Senior Judge Eugene Wright, who wrote the opinion, and Judges Robert Beezer and Diarmuid O'Scannlain. Judges Wright and Beezer are from Washington State; Judge Wright is a former Washington Superior Court Judge. *Accord*, Ferguson, *Washington Criminal Practice and Procedure* § 2745 at 39 (1984) ("[T]he person [must] be legally qualified as a witness").

[15] *See* Pet. Brief 5-7; *but see Brady v. Yount*, 42 Wn.2d 697, 699, 258 P.2d 458 (1953) ("An affidavit is not a pleading . . . ").

generally does not let lawyers testify and argue in the same proceeding. Washington Rule of Professional Conduct 3.7. Nor can the role of a witness be characterized as "quasi judicial", or an occasion for the exercise of discretion. Judges cannot testify in hearings over which they preside,[16] and a complaining witness has no discretion to do other than tell the truth in the "oath or affirmation" she provides. Where there is no discretion there is no justification for absolute immunity. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. at 436. There is no historical or institutional reason to shield with absolute immunity complaining witnesses who fail to do their legal duty to tell the truth under oath, just because those witnesses happen also to be deputy prosecutors.

III. COMPLAINING WITNESSES WHO MAKE FALSE STATEMENTS IN ARREST WARRANT AFFIDAVITS HAVE NEVER BEEN GIVEN ABSOLUTE IMMUNITY.

Ever since the Fourth Amendment was enacted to require an "oath or affirmation" supporting probable cause to arrest, persons who supplied that oath falsely and maliciously have been answerable in damages. Nothing in this Court's §1983 case law holds otherwise, as to prosecutors or anyone else.

Washington law provides specifically that "[n]o pleading other than an . . . information" is required to bring a felony charge. RCW 10.37.010.

[16] *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 21, 482 P.2d 775 (1971); Washington Rule of Evidence 605.

A. The Common Law.

"[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity." *Malley v. Briggs*, 475 U.S. at 340-41 (footnote omitted).

There were no exceptions to this rule for public prosecutors in 1871. "Indeed, as [the Court has] . . . previously recognized, *see Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 990, 47 L.Ed.2d 128 (1976), the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of §1983." *Burns v. Reed*, 500 U.S. at 499 (concurring and dissenting opinion of Justice Scalia) (original emphasis).[17]

That "first case," *Griffith v. Slinkard*, 44 N.E.1001 (Ind. 1896), rested on the idea that a prosecutor is "a judicial officer" who could not be held liable for "his own judgment" or any "judicial determination, however erroneous it may be, and however malicious the motive which produced it." *Id.* at 1003. Cases that followed *Griffith* rested

[17] Although the common law cases cited in *Malley* (*id.* at 341 n.3) did not involve *public* prosecutors (an office that hardly existed at the time), they did involve *private* "prosecutors", and often referred to the defendants as such. *See, e.g., Dinsman v. Wilkes*, 53 U.S. 390, 402 (1852), *quoting* 3 W. Blackstone Commentaries 126 (1765); *Randall v. Henry*, 5 Stew. & P. 367, 375-380 (Ala. 1834), and cases there cited.

on similar grounds.[18] Only one of these early cases involved a prosecutor who, like Petitioner, was sued for allegedly making "false representations induced a judge to issue a warrant of arrest." *Leong Yau v. Carden*, 23 Hawaii 362, 364 (1916). While recognizing the general rule that a public prosecutor "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction," the court in *Leong Yau* refused to extend absolute "judicial" immunity to that case. *Id.* at 364-5.[19]

Thus, as *Malley* held, there was no settled "immunity at common law that Congress intended to incorporate in the Civil Rights Act," *Wyatt v. Cole*, 504 U.S. 158, 164 (1992), for wrongful arrests caused by false oaths or affirmations. Nor were there other categories of common-law immunity which would likely have extended to such

[18] *See Smith v. Parman*, 165 Pac. 663 (Kan. 1917) ("The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"); *Watts v. Gerking*, 228 Pac. 135, 139 (Ore. 1924) (prosecuting attorneys "like grand jurors, . . . are vested with some discretion and judgment," and are therefore immune from suit for filing criminal charges without probable cause); *Yaselli v. Goff*, 12 F.2d 396, 404 (2d Cir. 1926), *affirmed* 275 U.S. 503 (1927) ("the public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"). *See also Kendall v. Stokes*, 44 U.S. 87, 98 (1845) ("a public officer is not liable to an action . . . in relation to which it is his duty to exercise judgment and discretion").

[19] Cf. *Schneider v. Sheperd*, 192 Mich. 82, 158 N.W. 182, 184 (1916) (prosecutor "was not entitled to the immunity of a quasi-judicial officer" for "instigating the arrest of the plaintiff" without a warrant or probable cause).

conduct by a prosecutor, had the case arisen. *See Burns v. Reed*, 500 U.S. at 499 (concurring and dissenting opinion of Justice Scalia). Common law "judicial immunity" would not apply to such conduct (as it would to the decision to prosecute itself) because it involves "no adjudication of rights." *Id.* at 504. Nor would the absolute immunity from defamation claims based on statements in judicial proceedings – for the common law universally allowed such suits for malicious prosecution or false arrest against "complaining witnesses who . . . set the wheels of government in motion by instigating a legal action", *Wyatt v. Cole*, 504 U.S. at 164-65, even though those same witnesses could not be sued for defamation in their testimony or arguments at trial. At best, such complaining witnesses could claim "quasi-judicial" immunities; but such immunities were qualified, not absolute. *See Burns v. Reed*, 500 U.S. 500 (concurring and dissenting opinion of Justice Scalia). That is what *Malley* extended to police officers who take on that role; and that is what the courts below granted Petitioner. She would have received no more at common law.

B. This Court's Cases.

This Court's modern decisions regarding absolute immunity from suit under §1983 have been consistent with the common law in this respect. Although the Court has granted public prosecutors broader immunity than they were afforded by any decision prior to 1871, it has never granted absolute immunity from suit for civil rights violations that would have been actionable then.

Imbler v. Pachtman "h[e]ld only that in initiating a prosecution and presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983", and granted absolute immunity to a prosecutor's "decision to initiate a prosecution" and the exercise of "discretion in the conduct of the trial and the presentation of evidence." 424 U.S. at 431, 421, 426. In so doing, it drew on two well established lines of common law immunity, judicial[20] immunity, and the immunity of lawyers from suits for defamation for "courtroom statement[s]" and "briefs and pleadings."[21] In *Burns v. Reed*, the Court applied the immunity established in *Imbler* to the questioning of a police witness at a pretrial hearing on a search warrant application – an action which, like questioning witnesses at a trial, "clearly involve[d] the prosecutor's role as an advocate for the State. . . . " 500 U.S. at 491.

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[20] "[A]ll three officials – judge, grand juror, and prosecutor – exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Id.* at 424. "[A] prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." *Id.* at 425. "A prosecutor often must decide . . . whether to proceed to trial where there is a sharp conflict in the evidence." *Id.* at 426 n.24. "A prosecuting attorney is required, constantly . . . to make decisions on a wide variety of sensitive issues." *Id.* at 431 n.33.

[21] *Id.* at 426 n.23. As the Court recognized in *Imbler*, the common law defamation immunity extended to witnesses as well as lawyers, *see Briscoe v. LaHue*, 460 U.S. 325 (1983), and to private as well as public counsel. Yet the Court has not accorded *any* immunity to private lawyers, or private individuals, who instigate legal actions under color of state law. *Wyatt v. Cole*, *supra*.

Neither of these decisions eliminated from the "species of tort liability" created by Congress in §1983, *Imbler v. Pachtman*, 424 U.S. at 417, a cause of action relating to the violation of civil rights that was clearly recognized at common law. In other cases, the Court has taken pains to preserve those causes of action. *Malley* did so with regard to suits for the false procurement of arrest warrants by police officers, in recognition of their deep common law roots. *Malley v. Briggs*, 475 U.S. at 340-343. *Buckley v. Fitzsimmons* did so with regard to out-of-court defamatory statements and the pretrial fabrication of evidence, functions it found lay outside a prosecutor's traditionally recognized "role as an advocate for the State." 509 U.S. at 273.

In sum, the Court's decisions in this area are true to Congress' language and presumed intent in enacting §1983. With few if any exceptions, every person acting under color of state law who causes another to be deprived of constitutional rights, through conduct that was civilly actionable in 1871, is subject to suit under this federal law. Petitioner would have this Court change that. There is no justification in history or precedent for doing so.

C. The Decisions of Lower Federal Courts.

Neither is it true, as Petitioner and her *amici* claim, that the lower federal courts are in disagreement over the issue presented here, and the decision below is aberrational. In fact, all but one of the cases that have considered the specific conduct for which Petitioner was sued – swearing an oath in support of an arrest warrant – have

reached the same conclusion as the courts below: that such conduct is covered by qualified, rather than absolute, immunity, whatever official engages in it.

Most of the lower court cases Petitioner cites involved different kinds of conduct – truly prosecutorial, advocative functions like those at issue in *Imbler* and *Burns*. Typically, the claims in those cases involved challenges to decisions to file charges or seek warrants, or to the presentation of the testimony of witnesses.[22] Where, as here, the claim is that the prosecutor himself acted as the witness and swore falsely, most courts have found, as did the court below, that the case is directly controlled by

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[22] *See, e.g., Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986) (absolute immunity for obtaining criminal complaints and arrest warrants based on allegedly false statements from a witness; "[t]he decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties"); *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983) (absolute immunity for "acting as an advocate for the State," "present[ing] . . . arguments to a justice of the peace," and "seeking a warrant for . . . arrest"); *Erlich v. Giuliani*, 910 F.2d 1220, 1224 (4th Cir. 1990) (absolute immunity for preparing a seizure warrant); *Schrob v. Catterson*, 948 F.2d 1402, 1413, 1417 (3rd Cir. 1991) (absolute immunity for "the preparation of an application for the search warrant" and for allegedly false statement in colloquy during warrant application, citing "lawyers['] . . . absolute immunity at common law for making false and defamatory statements in judicial proceedings"); *Peña v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (absolute immunity for "drafting or authorization of . . . criminal complaint [signed by the alleged victim's father] . . . procuring of the warrant" and requesting bail increases and punishment conditions); *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1149 (2d Cir. 1995) (absolute immunity for various alleged acts, including "misrepresentations," but no allegation of false swearing or procurement of an arrest).

Malley. In *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993), the court agreed that a prosecutor is absolutely immune for appearing before a judicial officer to present evidence or argue the law in support of an arrest warrant, but nonetheless held:

> [W]here the prosecutor switches functions from presenting the testimony of others to vouching, of his own accord, for the truth of the affidavits presented to the judicial officer, the prosecutor loses the protection of absolute immunity and enjoys only qualified immunity, just as the police officer was held to have in *Malley*.

5 F.3d at 1146. Similarly, in *Ireland v. Tunis*, ___ F.3d ___, 1997 WESTLAW 250434 (6th Cir., May 15, 1997), the court gave absolute immunity to prosecutors' decision to seek an arrest warrant, and their conduct in doing so – but refused to extend that immunity to the swearing out of warrant affidavits.

> [W]hen a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document, we believe the protection afforded by absolute immunity must give way to a qualified immunity inquiry. . . . Absolute immunity at common law did not extend to complaining witnesses who "set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164-65, 112 S.Ct. 1827, 118 L.Ed.2d 504 (1992); see also *Malley*, 475 U.S. at 340-41, 342 ("We do not find a comparable [common-law] tradition of absolute immunity for one whose complaint causes a warrant to issue"; "the generally accepted rule

> was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." (footnote omitted)). In *Malley*, the Supreme Court observed that the action of an "officer applying for a warrant . . . while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Malley*, 475 U.S. at 342-43. For these reasons, we believe that the only level of protection from suit that is potentially available when an official vouches for the truth of the contents of a criminal complaint is qualified immunity.

Id. at *12 (footnote and citations omitted).

The only contrary Circuit decision is the one that brought this case here, *Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997). Ironically, *Roberts* (like *Ireland*) involved not a prosecutor but "an investigator for the district attorney's office". 104 F.3d at 318. The Court in *Roberts* nonetheless found the case distinguishable from *Malley*, saying "the policy decisions underlying a grant of immunity focus on the function or role an individual fulfills in performing certain acts, not on the acts alone" (104 F.3d at 321), without ever identifying any respect in which the defendant investigator's actions, or their function, differed from those of the defendant police officer in *Malley*. It is *Roberts*, not this case, that is confused and inconsistent with this Court's precedents.

IV. THERE IS NO GOOD REASON TO EXTEND ABSOLUTE IMMUNITY TO PROSECUTORS WHO ACT AS COMPLAINING WITNESSES.

This Court has repeatedly said that the scope of absolute immunity from civil rights suits is not subject to "freewheeling policy choice[s]." *Buckley v. Fitzsimmons*, 509 U.S. at 268; *quoting Malley v. Briggs*, 475 U.S. at 342. *See Wyatt v. Cole*, 504 U.S. at 170 (concurring opinion of Justice Kennedy). Despite that, Petitioner and her fellow prosecutor/*amici* repeatedly raise the specter of crippled law enforcement in the hope of persuading the Court to expand their power to incarcerate citizens without fear of legal recourse.[23] At best, their arguments appear to be based in a misunderstanding, or a distrust, of the narrow scope of the decisions below. At worst, they are seriously exaggerated. There are many answers to their purported concerns.

1. The most obvious reason the decision below poses no threat to prosecutors is that there is no need for prosecutors to act as complaining witnesses, and few do. As the Solicitor General acknowledges, "federal prosecutors typically do not personally attest to the facts set forth in a complaint . . . or in an affidavit filed in support of an application for an arrest warrant. . . . " Brief for the United States as Amicus Curiae at 7. Neither do prosecutors in most jurisdictions, as far as we can ascertain. *See* note 12, above. Even Washington law does not require

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[23] *See* Petitioner's Brief at 25-29; Brief for the United States as Amicus Curiae at 21-24); Brief of the Washington Counties at 10-13; Brief of National District Attorneys Association at 9-10; Brief of National Association of Counties, et al., at 20-27.

this function to be performed by a prosecutor. *See* page 20-21, above; JA 27.

There is no legal reason that prosecutors cannot leave this function to the police, who have traditionally performed it. It would not even constitute a serious administrative inconvenience for them to do so: As the record here demonstrates (*see* note 1, above), sworn police reports are routinely available to prosecutors, and can themselves be easily submitted to the court for its independent review. Utilizing police reports thus carries little if any cost, preserves intact the prosecutor's absolute immunity, and has the beneficial effect of reducing the chance of error through miscommunication and providing the innocent citizen with legal recourse in the event of knowing falsehood. That is a far cry from the doomsday scenario portrayed by Petitioner and some of her *amici*.

2. Prosecutors who for some reason don't wish to rely on the police can still avoid liability by utilizing a summons procedure such as that authorized by Wash. CrR 2.2(b), rather than an arrest warrant, to obtain jurisdiction over a criminal defendant. Although the law on this is not settled, it appears that allegations of abuse of the summons process do not support a claim under §1983. *Albright v. Oliver*, 510 U.S. 266 (1994).

3. Even if prosecutors choose to have defendants arrested and to act as the complaining witnesses, their amenability to lawsuits for abuses in that role should cause little distraction from their duties. Unlike a lawsuit which challenges a charging decision or the conduct of a trial, a lawsuit alleging false statements in an arrest warrant affidavit is, by its nature, focused and specific; such

suits pose scant threat of becoming "a virtual retrial of the criminal offense in a new forum. . . . " *Imbler v. Pachtman*, 424 U.S. at 425.

Nor are such lawsuits likely to be common, if prosecutors act responsibly. The experience in Washington state, where prosecutors have prepared certificates of probable cause for decades (*see* Brief of 39 Washington Counties at 2-3), bears this out: this is the only such case ever reported. Nationally, there is only one other reported case (*Kohl*) involving a prosecuting attorney[24] sued federally for performing this function.

It is inconceivable that such an attenuated threat of a lawsuit – a lawsuit in which they will enjoy the protection of qualified immunity – will significantly impede or distract prosecutors who choose to expose themselves to that threat by performing this function. That is particularly so because the function at least theoretically carries with it the potential penalty of perjury, and disciplinary action[25] – in addition to the risk of losing a case and freeing a guilty defendant – for knowing abuse. It is simply not credible to argue that fear of lawsuits like this one justifies an exception to the usual assumption that qualified immunity provides ample protection for conscientious officials. *See Malley v. Briggs*, 475 U.S. at 341.

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[24] The other two reported federal decisions addressing this issue, *Roberts* and *Ireland*, involved prosecutors' investigators. *See* page 29, above.

[25] See RCW 9A.72.040 (false swearing); Washington Rule of Professional Conduct 3.3 (candor toward tribunals).

4. On the other hand, extending absolute immunity to prosecutors who take on the role of witnesses, as well as advocates, would set a truly dangerous precedent for citizens. It would give innocent people who are wrongfully seized and jailed no realistic legal recourse,[26] for even flagrant abuses of power. In principle, it seems a huge risk of freedom to give executive officials the power both to state the facts as a witness and to argue the law as

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[26] The arguments of Petitioner's *amici* regarding the efficacy of other methods of control of prosecutorial abuses (*e.g.*, Brief of the United States at 23-4, Brief of the National Association of Counties at 24) blink reality. The reality is reflected in this case: although Ms. Kalina plainly made false statements under oath in a document filed with the court, she has been subjected to no discipline and the responsible prosecuting attorney's office (her own) is defending her, not prosecuting her. That is hardly surprising. We have not found a single reported Washington case of bar discipline or criminal prosecution for acts of prosecutorial misconduct.

Moreover, it is worth noting that the differences between prosecutors, private lawyers, and police, with regard to professional regulation, *see Imbler v. Pachtman*, 424 U.S. at 429 n.30, have narrowed in the decades since *Imbler*. Private lawyers are no less subject to bar discipline, and court sanctions, than are prosecutors, and are certainly more likely to be prosecuted for criminal conduct in relation to their practices; but they are afforded no immunity from Section 1983 liability at all. *Wyatt v. Cole, supra*. In recent years police officers have commonly become subject to administrative review and discipline as well. *See* Seattle Police Department Manual of Policies and Procedures § 1.09; "Citizen Review of the Police, 1994: A National Survey," Police Executive Research Forum, January, 1995. Yet, under *Malley*, they are entitled only to qualified immunity for the conduct engaged in by Petitioner here.

an advocate for revocation of a citizen's liberty,[27] and exempt them from liability for any manner of abuse in so doing. It surely does not counsel in favor of taking that risk that, in fact, this unchecked power would be given to some 2,350 prosecutors' offices nationwide, staffed by untold thousands of overworked and undersupervised government lawyers. *See* Brief of National District Attorneys Association at 9-10.

Certainly, there is no reason to believe that was the policy choice of the Congress of 1871. Its choice was to provide citizens like Rodney Fletcher legal recourse against "every person" who caused them to be denied their constitutional rights under color of state law. Neither precedent nor policy justifies an exception to that rule here.

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[27] *See generally* Y. Feofanov, Politics and Justice in Russia: Major Trials of the Post Stalin Era (Barry Trans. 1996).

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted,

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(11)

IN THE
Supreme Court of the United States
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v.

RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

Prosecutor Kalina is entitled to absolute immunity for seeking an arrest warrant as an integral part of initiating a prosecution against Mr. Fletcher because, by statute and court rule, she functioned as an advocate for the state in the judicial phase of the criminal process. Nothing cited or argued by Mr. Fletcher places prosecutor Kalina outside the advocatory function and beyond the protection of absolute immunity.

This reply brief will make three points:

First, Ms. Kalina will explain that Mr. Fletcher's argument merely applies a label to Ms. Kalina's actions, while ignoring the advocatory function of those actions. A proper application of the functional analysis, however, re-

quires a consideration of both the nature and function of the act. The effect of a proper application of this analysis is to distinguish the signing of a document as part of an investigation, as occurred in *Malley v. Briggs*, 475 U.S. 335 (1986), from the signing of a document as part of the initiation of a prosecution, as occurred in the case now before the Court.

Second, Ms. Kalina will address Mr. Fletcher's erroneous assertion that a prosecutor who executes a certification in support of an arrest warrant is analogous to a common law complaining witness. Unlike a complaining witness, the prosecutor functions as an advocate for the state. That difference between the function of the witness and the function of the prosecutor is dispositive on the immunity issue.

Third, Ms. Kalina will briefly address Mr. Fletcher's suggestion that recognizing absolute immunity here would represent an expansion of the law. In fact, Ms. Kalina's actions fall well within the limits of conduct to which this Court has accorded absolute immunity.

ARGUMENT

I. THIS COURT'S FUNCTIONAL ANALYSIS REQUIRES MORE THAN APPLICATION OF A LABEL TO AN ACT, AND CONTEMPLATES AN INQUIRY INTO THE NATURE AND FUNCTION THAT THE CHALLENGED ACT SERVES WITHIN THE CRIMINAL PROCESS.

A prosecutor's advocatory activities which are "intimately associated with the judicial phase of the criminal process . . . [are] *functions* to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (emphasis added). This Court therefore has consistently focused on the "nature" and "function" of the challenged activity to determine whether the activity falls within the scope of absolute immunity.

See Mirales v. Waco, 502 U.S. 9, 13 (1991) (per curiam); *see also Richardson v. McKnight*, No. 96-318, ——S. Ct. ——, 1997 WL 338548, at *6 (June 23, 1997) (discussing the use of functional analysis to determine whether absolute or qualified immunity attaches). Where "the prosecutor's actions are closely associated with the judicial process," absolute immunity applies. *Burns v. Reed*, 500 U.S. 478, 495 (1991). Determining whether the challenged activity is closely associated with the judicial process does not require an "inquiry into the actor's subjective intentions," as Mr. Fletcher suggests. *See* Brief for Respondent at 15. Either the challenged function is closely associated with the judicial process as an objective matter, or it is not.[1]

Here, the critical distinction between this case and *Malley* arises from the intimate association of Ms. Kalina's advocatory actions with the initiation of the judicial process. In *Malley*, the police officer's filing of a criminal complaint in a grand jury system was not advocatory and did not initiate a prosecution.[2] While the police officer's act

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[1] Mr. Fletcher accuses Ms. Kalina of urging this Court "to add a step to its 'functional analysis' of immunity issues, a step that would focus on the 'nature and function of a particular act, not on the act itself.'" Brief for Respondent at 14. This step is nothing new. Rather, this Court's decisions in *Mirales* and *Stump v. Sparkman*, 435 U.S. 349 (1978), make clear that the function of the act, and not the label applied to the act, determines whether immunity attaches.

[2] In an effort to blur the distinction between this case and *Malley*, the court below argued that "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." *See Fletcher v. Kalina*, 93 F.3d 653, 655-56 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 1079 (1997); JA 27. This is not true, for the simple reason that Ms. Kalina's actions were inextricably intertwined with her decision as an advocate to initiate a prosecution, while the police officer in *Malley* did not play an advocate's role in deciding whether to prosecute. The distinction from *Malley* thus illustrates Justice Kennedy's observation in *Buckley v. Fitzsimmons*, 509 U.S. 259, 289

may have been "a vital part of the administration of criminal justice, [it] is further removed from the judicial phase of criminal proceedings than the act of a prosecutor" who, as an advocate for the state, actually initiates a criminal prosecution. *Malley*, 475 U.S. at 342-43. In contrast, every aspect of Ms. Kalina's advocatory conduct implemented the inherently prosecutorial decision to charge Mr. Fletcher with a crime.

This Court has noted that "[t]he common law has never granted police officers an absolute and unqualified immunity . . . ." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The Court has recognized that there is an inherent difference between the functions a police officer and a prosecutor perform within the criminal justice system. A prosecutor initiates criminal charges; a police officer does not.[3]

Every aspect of Ms. Kalina's advocatory conduct was intimately involved in "the judicial phase of criminal proceedings" and implemented the inherently prosecutorial decision to charge Mr. Fletcher. Accordingly, given the *nature* and *function* of Ms. Kalina's acts, she should be entitled to absolute immunity.[4]

(1993) (Kennedy, J., concurring in part and dissenting in part), that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and *to advance different functions*" (emphasis added).

[3] A helpful and effective analysis of this point is contained in the Brief for the United States as *Amicus Curiae* § F, at 24-28.

[4] *See* Petitioner's Brief on the Merits at 19-23. Arguments supporting this conclusion are persuasively made in the submissions of the *amici* appearing in support of Ms. Kalina. *See* Brief of *Amicus Curiae*, National District Attorneys' Association et al. at 3-5; Brief of National Association of Counties et al. as *Amicus Curiae* at 11-16; Brief for the United States as *Amicus Curiae* at 24-26.

II. THERE IS A PROFOUND DIFFERENCE BETWEEN A PROSECUTOR INITIATING A PROSECUTION AND A COMMON LAW COMPLAINING WITNESS.

Mr. Fletcher also attempts to analogize Ms. Kalina's conduct to that of a common law complaining witness. As with his effort to analogize this case to *Malley*, Mr. Fletcher's argument relies upon the proposition that one can resolve the immunity issue by labeling the act performed (i.e. the execution of a sworn statement), rather than by analyzing its nature and function. Allowing immunity to turn on the label attached to the act at issue, however, would ignore two decades of this Court's jurisprudence.[5] Indeed, the Solicitor General has explained this point in his *amicus* brief, and Mr. Fletcher offered no response. *See* Brief for the United States as *Amicus Curiae* at 12-18, 27-28 (containing a complete discussion of why the execution of a certification should be deemed an advocatory act similar to other proffers of evidence); *see also* Brief of the National Association of Counties et al. as *Amicus Curiae* at 16-18.[6]

This Court has noted that "[a]lthough public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining

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[5] It also would ignore the relevant common law authority embodied in numerous cases. *See, e.g., Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927) (per curiam); *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896); and *Watts v. Gerking*, 222 P. 318, 228 P. 135 (Ore. 1924). These cases uniformly extend immunity to the prosecutor regardless of the role the prosecutor played in the arrest process. The only common law case Mr. Fletcher cites in support of denying absolute immunity to a prosecutor for making false representations in support of an arrest warrant is *Leong Yau v. Carden*, 23 Haw. 362 (1916). The reasoning of *Leong Yau*, however, was rejected by this Court in both *Imbler* and in its affirmance of *Yaselli*. *See Imbler*, 424 U.S. at 422 n.19; *Yaselli*, 12 F.2d at 405-06, *aff'd*, 275 U.S. 503 (1927) (per curiam).

[6] The complete argument concerning the complaining witness issue appears in the Brief of the National Association of Counties et al. as *Amicus Curiae* at 16-18, and especially at 17 n.3.

witnesses who . . . [as private parties] set the wheels of government in motion by instigating a legal action." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992) (citations omitted). Mr. Fletcher would have this Court ignore *Wyatt* and engage in a labeling exercise focused solely on the act performed (i.e. the execution of a sworn statement), rather than its nature and function.

Thus, as Mr. Fletcher's brief seems to concede, a prosecutor who presents evidence to a judge in support of a search warrant application is performing an advocatory act to which absolute immunity attaches. *See* Brief for Respondent at 19 (citing *Burns*, 500 U.S. at 491) . Here, then, Mr. Fletcher challenges only the manner in which Ms. Kalina presented the evidence (i.e. through a Certification summarizing the investigation), on the theory that Ms. Kalina's manner of presentation made her analogous to a complaining witness solely because she signed the Certification under oath.

Mr. Fletcher offers no reason why Ms. Kalina's written submission of evidence in the form of a sworn Certification should be given a different level of immunity than another form of submission having the same function. In substance, it should be irrelevant whether Ms. Kalina, as an advocate for the state, provided the "oath or affirmation" in support of the application for an arrest warrant or presented the facts to the court in some other fashion or by some other means. In each case, the advocatory function served is the same. Under this Court's functional analysis, deputy prosecutor Kalina is entitled to absolute immunity.

III. MS. KALINA HAS NOT SOUGHT AN EXPANSION OF THIS COURT'S FUNCTIONAL ANALYSIS OF ABSOLUTE IMMUNITY.

Ms. Kalina does not dispute that "most public officials are entitled only to qualified immunity," as Mr. Fletcher

argues, citing *Buckley*, 509 U.S. at 268.[7] Here, however, Ms. Kalina's conduct as an advocate for the state in filing criminal charges and executing a certification in support of an arrest warrant falls within the governmental functions which this Court has previously recognized as "deserv[ing] [of] absolute protection from damages liability." *Id.; see also Imbler*, 424 U.S. at 409.

Ms. Kalina has never asked the Court to grant her absolute immunity solely "by virtue of her position as a Deputy Prosecuting Attorney" [8] nor by "subtly modifying the Court's 'functional approach' to absolute immunity claims." *See* Brief for Respondent at 1, 6.[9] Ms. Kalina

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[7] *See also Richardson*, —— S. Ct. ——, 1997 WL 338548, at *5 (noting that public prison guards have been accorded qualified immunity).

[8] This Court has, however, recognized that prosecutors and judges, unlike other public officials, routinely perform functions for which absolute immunity must be accorded:

> As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The point of immunity for such officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

Clinton v. Jones, 117 S. Ct. 1636, 1643 (1997) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 202-04 (1979)).

[9] While a prosecutor's status as a prosecutor is relevant to determining the nature and function of a questioned act, it is not controlling. After all, only a prosecutor can act as an advocate for the state, not a police officer. Of course, not all conduct of a prosecutor is absolutely immune, only that which serves or advances the advocatory function. Certainly, as this Court has previously held, such non-advocatory actions of a prosecutor as giving legal advice to the police, engaging in investigative activities with expert witnesses, and holding a press conference are not absolutely immunized. *Burns*, 500 U.S. at 493 (regarding giving legal advice to police); *Buckley*,

asks only that the Court continue to apply its functional analysis as the Court has done consistently in prior cases by inquiring into the "'nature' and 'function' of [Ms. Kalina's] act, not the 'act itself.'" *Mirales*, 502 U.S. at 13; *see also Stump v. Sparkman*, 435 U.S. at 362.

CONCLUSION

For the foregoing reasons, Ms. Kalina respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit and the decision of the district court below and remand this matter to the district court for entry of a judgment of dismissal.

Respectfully submitted,

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July 9, 1997

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509 U.S. at 274-75, 277 (regarding investigative activities and press conferences).

(10)

No. 96-792

In the Supreme Court of the United States

OCTOBER TERM, 1996

LYNNE KALINA, PETITIONER

v.

RODNEY FLETCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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35 pp

QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity from suit for requesting the issuance of an arrest warrant in conjunction with the filing of a criminal information against an individual.

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INTEREST OF THE UNITED STATES

The United States employs approximately 4500 prosecuting attorneys, who file criminal charges in approximately 38,000 cases annually. United States Dep't of Justice, *United States Attorneys Annual Statistical Report: Fiscal Year 1996*, at 1, 70 (Table 3). The United States thus has a substantial interest in questions of prosecutorial immunity. Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued on an implied right of action for violations of constitutional rights. *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The immunity granted to federal officers in *Bivens* actions generally parallels the immunity that state officers enjoy in suits under 42 U.S.C. 1983. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457

U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). Thus, the disposition of the immunity issue in this case could significantly affect federal prosecutors sued for damages as a result of actions taken in the performance of their official duties.

STATEMENT

1. In Washington, criminal prosecutions are initiated either by grand jury indictment or the filing of an information. Wash. Rev. Code § 10.37.010 (1996); Wash. Crim. R. 2.1(a) (1994). The majority of felony cases are commenced through the filing of an information. Pet. 4.

To initiate criminal charges by information, the prosecutor typically files a set of three documents with the court. The first document is the information, which is a "plain, concise and definite written statement of the essential facts constituting the offense charged," and is signed by the prosecutor. Wash. Crim. R. 2.1(a)(1). The second filing is a Certification for Determination of Probable Cause. That statement sets forth the facts supporting a determination that there is probable cause to charge and arrest an individual for the crime alleged in the information. It apparently is common practice for the certification to be signed, under oath, by the prosecutor. See Pet. 4; Br. in Opp. 12 n.6. The third document submitted to the court is a motion requesting that the court (i) find probable cause, (ii) issue an arrest warrant, and (iii) fix bail or release the individual on personal recognizance. J.A. 12.

2. Petitioner Lynne Kalina is a deputy prosecutor for the King County Prosecuting Attorney in the State of Washington.[1] In December 1992, petitioner filed a criminal information in King County Superior Court charging

[1] We accept as true, for present purposes, the relevant factual allegations contained in respondent's complaint.

respondent Rodney Fletcher with second-degree burglary, based on an alleged theft of computer equipment from Our Lady of Guadalupe School. Along with the information, petitioner filed a certification for determination of probable cause, the police department's suspect information report, and a motion for a determination of probable cause, issuance of an arrest warrant, and the establishment of bail. Pet. App. 2a; J.A. 13-20; see also J.A. 11-12 (affidavit of petitioner describing preparation of documents). The certification for determination of probable cause recited that petitioner was familiar with the police report and investigation conducted by the Seattle Police Department, and it set forth facts, apparently based on the police report and investigation, on which the motion for determination of probable cause was based. J.A. 19-20.

The Superior Court granted the motion and issued an arrest warrant for respondent. Respondent was arrested and detained on September 24, 1993. Subsequently, on October 26, 1993, the charges were dismissed on motion of the prosecuting attorney, apparently when she discovered that some of the information on which the charges were based was erroneous. Pet. App. 2a; J.A. 6.

3. Following dismissal of the charges against him, respondent filed suit under 42 U.S.C. 1983 alleging that the probable cause certification contained information that petitioner knew or should have known was false. J.A. 5. The complaint sought damages for the erroneous arrest. J.A. 6.

Petitioner moved for summary judgment on the ground of absolute prosecutorial immunity. The district court rejected the motion in a minute order. Pet. App. 8a. The court of appeals affirmed, holding that petitioner's actions in procuring the arrest warrant were protected only by qualified immunity. *Id.* at 5a-7a. The court relied on this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986),

which held that police officers do not enjoy absolute immunity when they apply to a court for an arrest warrant Pet. App. 5a-7a.

SUMMARY OF ARGUMENT

Absolute immunity should attach when a prosecutor seeks an arrest warrant in conjunction with the filing of criminal charges against an individual. This Court has applied a functional approach to immunity questions, which focuses on the nature of the function performed by an official and its relationship to the judicial or other governmental process. Prosecutorial activities that are advocatory, closely related to the judicial process, and preliminary to the initiation of a prosecution, such as participation in a probable-cause hearing, have been held to warrant absolute immunity.

When seeking an arrest warrant predicated on the filing of charges against an individual, a prosecutor is acting in her role as an advocate for the government before a neutral decisionmaker. Her appearance reflects a considered legal judgment on the part of the government that an individual should be charged with a crime and brought before a court, and that terms should be set to ensure his presence pending adjudication of the criminal matter. The prosecutor's role in filing such papers with the court is neither administrative nor investigative. The filing of charges and a request for an arrest warrant mark the onset of a judicial process, as evidenced by the triggering of speedy trial provisions and the establishment of the terms of bail. Indeed, the request for an arrest warrant in these circumstances is the functional equivalent of a prosecutor's participation in a probable-cause hearing, which this Court has held warrants absolute immunity.

A grant of absolute immunity to a prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges would be consistent with common law history, which generally immunized such conduct from suit. A denial of immunity, moreover, would permit plaintiffs to circumvent the prosecutor's immunity from malicious prosecution suits by challenging the arrest that ushered in the prosecution. Because the criminal process provides ample alternative checks on prosecutorial error, absolute immunity is appropriate.

Finally, petitioner's signing of the certification in support of probable cause does not strip her of absolute immunity. Petitioner did not purport to attest to facts as a percipient witness. Her certification was functionally comparable to a proffer of evidence, relaying what the police investigators would, if called as witnesses, state in court. Petitioner filed the certification, moreover, as part of a package of documents that formally initiated the prosecution against respondent. Plaintiffs should not be able to circumvent the absolute immunity attaching to that conduct by dissecting the process paper by paper.

ARGUMENT

PROSECUTORS ARE ABSOLUTELY IMMUNE FROM SUIT FOR DAMAGES FOR SEEKING AN ARREST WARRANT IN CONJUNCTION WITH THE FILING OF CRIMINAL CHARGES AGAINST AN INDIVIDUAL

A. Introduction

In determining whether a prosecutor is entitled to absolute immunity from suit under 42 U.S.C. 1983 when engaging in particular conduct, the assessment of the function of that conduct in the criminal process presents a question of federal law. *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976) (inquiry focuses on congressional intent); *Hampton* v. *City of Chicago*, 484 F.2d 602, 608 (7th Cir.

1973), cert. denied, 415 U.S. 917 (1974). Thus, while criminal procedures and practices vary somewhat from jurisdiction to jurisdiction, the ultimate question in each case must be whether the defendant was functioning in a capacity for which absolute immunity is appropriate under this Court's decisions and the common law traditions and policies on which prosecutorial immunity is based.

1. To place our submission in context, we note at the outset that federal practice departs from the Washington practice at issue in this case in two respects.

First, under Washington law, a felony prosecution may be instituted by the filing of an information. Wash. Crim. R. 2.1; Wash. Rev. Code § 10.37.010 (1996); see also *Beck* v. *Washington*, 369 U.S. 541, 545 (1962) ("Ever since *Hurtado* v. *California*, 110 U.S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions."). By contrast, unless waived by the defendant, the United States can initiate a felony prosecution only by indictment. U.S. Const. Amend. V; Fed. R. Crim. P. 7(a).[2] An indictment, "fair upon its face" and returned

[2] An arrest warrant may be issued on the basis of a complaint. See Fed. R. Crim. P. 4(a). Such an arrest, like a warrantless arrest that is permitted by the Fourth Amendment, see *United States* v. *Watson*, 423 U.S. 411 (1976), triggers statutory time limits for the defendant's indictment or the filing of an information. See 18 U.S.C. 3161(b). Until the individual is charged by indictment or information, however, no federal prosecution has commenced in the constitutional sense. Accordingly, in federal prosecutions, no Sixth Amendment right to counsel attaches until the individual is charged by indictment or information, even if he previously has been named in a complaint. See, *e.g.*, *United States* v. *Langley*, 848 F.2d 152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); cf. *United States* v. *Gouveia*, 467 U.S. 180, 187-189 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975). In light of the requirements of the Fifth Amendment's Grand Jury Clause, it is not until the federal government has obtained an indictment (or its waiver) that the government may be

by a "properly constituted grand jury," conclusively determines the existence of probable cause and, in the federal sphere, requires issuance of an arrest warrant without further inquiry. *Gerstein* v. *Pugh*, 420 U.S. 103, 117 n.19 (1975) (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932)). Where a prosecution—federal or state—is initiated by information, however, an independent showing and determination of probable cause is necessary for the issuance of an arrest warrant or for the continued detention of an individual arrested without a warrant. U.S. Const. Amend. IV; *Gerstein*, 420 U.S. at 116 n.18, 120-122; see also Fed. R. Crim. P. 5.1 (a)-(b).

Second, federal prosecutors typically do not personally attest to the facts set forth in a complaint filed under Fed. R. Crim. P. 3 or in an affidavit filed in support of an application for an arrest warrant under Fed. R. Crim. P. 4(a).[3] Instead, a law enforcement agent ordinarily attests to those facts. Where an attorney for the government is involved, the attorney may sign or approve the complaint, which would reflect the attorney's conclusion that the facts, as recited by the law enforcement agent, give rise to probable cause to believe that the person named committed the offense and that the complaint should be filed and an arrest warrant issued. In doing so, however, the attorney for the government acts in her role as a legal representative of the United States and an officer of the court, just as when the attorney signs an indictment or information. Of course, the attorney for the government might draft the complaint or affidavit to be signed by the law enforcement agent in support of an arrest warrant, just as attorneys in

said to have "committed itself to prosecution." *Gouveia*, 467 U.S. at 189.

[3] The complaint "is a written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 3.

other contexts assist in drafting affidavits based on information furnished by and within the knowledge of the affiant. But in performing that function, too, the attorney for the government acts in her capacity as a lawyer, not a witness.[4]

2. Respondent's complaint (J.A. 4-7) and brief in opposition filed in this Court (at 7-28) focus on the narrow question of whether a prosecutor enjoys absolute immunity when she acts as a complaining witness. The question presented in the certiorari petition, however, is more broadly cast in terms of whether absolute immunity attaches when a prosecutor causes an arrest warrant to issue in conjunction with the filing of criminal charges against an individual. Pet. i. That formulation can be understood to include actions by a prosecutor in filing a motion for an arrest warrant based on the affidavit or certification of a police officer, rather than of the prosecutor herself.

The scope of the court of appeals' decision is unclear in the same respect. The court's opinion initially states the issue broadly. See Pet. App. 3a ("Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit."). Its rejection of the Sixth Circuit's decision in *Joseph* v. *Patterson*, 795 F.2d 549, 555 (1986), cert. denied, 481 U.S. 1023 (1987), likewise focuses on the seemingly broader issue of "whether seeking an arrest warrant merits absolute immunity." Pet. App. 7a.[5]

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[4] Similarly, in other contexts (such as bail hearings), federal prosecutors make proffers of evidence, including the facts to which witnesses, if called, would testify. See, *e.g.*, *United States* v. *Smith*, 79 F.3d 1208, 1209 (D.C. Cir. 1996). Such proffers, however, are representations by counsel, not statements by witnesses.

[5] In a similar vein, the court below relied for its holding on a statement by the Eighth Circuit in *Kohl* v. *Casson*, 5 F.3d 1141, 1146 (1993), that "the function of seeking an arrest warrant is subject only to qualified immunity." Pet. App. 5a-6a.

The court's actual holding or "[c]onclusion," however, is ambiguous: it states that petitioner is not entitled to immunity "for her actions in filing a declaration for an arrest warrant." *Ibid.* The wording of the opinion also raises concerns about whether absolute immunity would be denied to a prosecutor in connection with her preparation or drafting of an affidavit for signature by a law enforcement officer. *Id.* at 5a ("we hold that a prosecutor is not absolutely immune when *preparing* a declaration in support of an arrest warrant") (emphasis added); *id.* at 6a ("Kalina's actions in *writing*, signing and *filing* the declaration for an arrest warrant" do not enjoy immunity) (emphases added).

Because of the nature of federal practice and the wording of the opinion below, this brief first addresses whether absolute immunity attaches to a prosecutor's action generally in seeking an arrest warrant in conjunction with the filing of criminal charges. We also address the court of appeals' suggestion that absolute immunity does not include a lawyer's drafting and preparation of documents to be filed in court. Finally, we address respondent's narrower point that absolute immunity should be denied for the prosecutor's execution of the certification on the theory that she acted as a complaining witness.

B. Prosecutors Enjoy Absolute Immunity Both For The Initiation Of A Prosecution And For Advocatory Acts That Are Preparatory To The Initiation Of A Prosecution

Section 1983 creates a private cause of action against "[e]very person" who, under color of state law, deprives

another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. 1983. Although Section 1983's language is sweeping and does not expressly provide for immunities from suit, this Court has held that the statute "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler*, 424 U.S. at 418; see also *Briscoe* v. *LaHue*, 460 U.S. 325, 330-331 (1983). Immunities "well grounded in history and reason" thus will shield or limit the liability of Section 1983 defendants. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)). Whether a government official enjoys absolute or qualified immunity turns upon a functional analysis, which generally focuses on the "nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269; see also *Cleavinger* v. *Saxner*, 474 U.S. 193, 201 (1985).

1. Applying the functional approach, this Court held in *Imbler* that prosecutors enjoy absolute immunity in "initiating a prosecution and in presenting the State's case." 424 U.S. at 431. The common law had long immunized such conduct from tort suits, because "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424-425; see also *id.* at 427-428 (the threat of liability "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system").

Furthermore, a prosecutor must "inevitably make[] many decisions that could engender colorable claims of constitutional deprivation" and must do so "under serious constraints of time and even information." *Imbler*, 424 U.S. at 425. Consequently, prosecutors "would face

greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Ibid.* At the same time, the Court recognized that absolute immunity would not leave prosecutorial abuses unchecked. "[A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429; see also *ibid.* (noting that prosecutors are also subject to criminal prosecution, under 18 U.S.C. 242, for the intentional deprivation of constitutional rights).[6]

2. In *Burns* v. *Reed*, 500 U.S. 478 (1991), the Court recognized that a prosecutor's duties "as advocate for the State" are not limited to the initiation and prosecution of a criminal case, but also include "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 486 (quoting *Imbler*, 424 U.S. at 431 & n.33). The Court held that a prosecutor's participation in a probable-cause hearing and request for a search warrant during that hearing enjoyed absolute immunity. *Burns*, 500 U.S. at 487. The actions of appearing before a judge and presenting evidence in support of the motion for a search warrant "clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer.'" *Id.* at 491 (quoting *Imbler*, 424 U.S. at 430-431 & n.33). Further, because the issuance of a search warrant "is unquestionably a judicial act," *Burns* reasoned that the prosecutor's "appear[ance] at a probable-cause hearing is 'intimately associated with

[6] The availability of internal disciplinary measures against a prosecutor also serves to deter and punish violations of constitutional rights. In the Department of Justice, for example, the Office of Professional Responsibility is charged with investigating allegations of professional misconduct by Department attorneys and recommending appropriate sanctions if violations are found. See 28 C.F.R. 0.39.

the judicial phase of the criminal process,'" and thus absolute immunity is necessary to protect the integrity of the judicial process. *Burns*, 500 U.S. at 492 (quoting *Imbler*, 424 U.S. at 430); see also 500 U.S. at 494 ("Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation.") (emphasis omitted). The recognition of absolute immunity also was consistent with common law precedent, which immunized prosecutors from suit for statements made in "any hearing before a tribunal which perform[ed] a judicial function." *Burns*, 500 U.S. at 490 (quoting W. Prosser, *Law of Torts* § 94, at 826-827 (1941)).

At the same time, *Burns* declined to extend absolute immunity to a prosecutor's rendering of legal advice to police in connection with their investigation. The Court held that such conduct was too far removed from the judicial process to merit heightened protection. *Burns*, 500 U.S. at 494-496. The opinion also relied upon the absence of a common law predicate for that claim of absolute immunity. *Burns*, 500 U.S. at 492-493.

3. Finally, in *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), the Court reaffirmed that prosecutors are among those officials who perform "'special functions' which, because of their similarity to functions that would have been immune when Congress enacted §1983, deserve absolute protection from damages liability." *Id.* at 268-269 (quoting *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)). The Court also reiterated that absolute prosecutorial immunity is not confined to the initiation and prosecution of a criminal case. "We have not retreated * * * from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Buckley*, 509 U.S. at 273; see also *id.* at 280 (Scalia, J., concurring). The types of such actions that occur before the institution of a criminal prosecution and trial include the prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to a decision-making tribunal. *Id.* at 273; see also *id.* at 284 (Scalia, J., concurring).

At the same time, *Buckley* held that a prosecutor is not protected by absolute immunity when he undertakes administrative or investigative actions, such as searching for expert corroboration of evidence and making statements to the media. 509 U.S. at 274-278. A prosecutor's role as advocate for the State, *Buckley* explained, generally does not attach "before he has probable cause to have anyone arrested." *Id.* at 274.[7]

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[7] Once accorded absolute immunity, an official retains that immunity regardless of the motives animating her action. *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871); see also *Cleavinger*, 474 U.S. at 199-200; *Dorman* v. *Higgins*, 821 F.2d 133, 139 (2d Cir. 1987). Nor does an allegation of error or impropriety in the execution of the function dissipate the protection—otherwise it would be no immunity at all. See *Buckley*, 509 U.S. at 271 (immunity analysis "focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful"); *Mireles* v. *Waco*, 502 U.S. 9, 12-13 (1991). When the conduct is so improper as to exceed any plausible jurisdiction of the official, absolute immunity may not apply. See *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978). The court of appeals neither found nor suggested that petitioner exceeded the scope of her jurisdiction in executing the certification.

C. A Prosecutor's Obtaining Of An Arrest Warrant In Conjunction With The Filing Of Criminal Charges Is Conduct Undertaken In The Role Of An Advocate For The Government

Whether characterized as the formal institution of a criminal prosecution or as advocatory conduct preparatory to that initiation, a prosecutor's decision to file criminal charges against an individual and to seek an arrest warrant in conjunction with the filing of charges should be accorded absolute immunity. *Burns*, 500 U.S. at 486, 491 (absolute immunity embraces "action[] preliminary to the initiation of a prosecution" when undertaken by a prosecutor "as advocate for the State"); *Imbler*, 424 U.S. at 431 (prosecutor is absolutely immune from civil liability "in initiating a prosecution"). In both instances, the prosecutor appears before a court as an advocate for the government, and her conduct is intimately related to the criminal judicial process.[8]

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[8] With the exception of the court below, the courts of appeals generally have accorded absolute immunity to a prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges. See *Roberts* v. *Kling*, 104 F.3d 316, 320 (10th Cir. 1997) (absolute immunity granted); *Peña* v. *Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (same); *Barr* v. *Abrams*, 810 F.2d 358, 361-362 (2d Cir. 1987) (same); *Joseph* v. *Patterson*, 795 F.2d 549, 555-556 (6th Cir. 1986) (same), cert. denied, 481 U.S. 1023 (1987); cf. *Schrob* v. *Catterson*, 948 F.2d 1402, 1416 (3d Cir. 1991) (seeking seizure warrant in conjunction with filing of *in rem* complaint protected by absolute immunity); *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223-1224 (4th Cir. 1990) (seeking order freezing assets in conjunction with indictment accorded absolute immunity). In *Kohl* v. *Casson*, 5 F.3d 1141 (1993), the Eighth Circuit held that "a prosecutor is absolutely immune for appearing before a judicial officer to present evidence in support of an application for an arrest warrant," but enjoys only qualified immunity for participating in the preparation of an affidavit in support of the warrant. *Id.* at 1146-1147.

1. A prosecutor's conduct in obtaining an arrest warrant in conjunction with the filing of criminal charges is functionally indistinguishable from a prosecutor's participation in a probable-cause hearing, which *Burns* held to be protected by absolute immunity. 500 U.S. at 487. In both instances, the prosecutor offers a court evidence documenting the government's legal position that probable cause exists and seeks a judicial determination of probable cause and a warrant predicated on that finding. In particular, the filing of a motion for issuance of an arrest warrant represents the prosecutor's "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation" to the court. *Buckley*, 509 U.S. at 273.

The prosecutor's formal appearance before the court, through the filing of papers and presentation of evidence, cannot be labelled administrative or investigative, and the court of appeals made no effort to do so. The prosecutor speaks as a legal representative of the State and conveys the government's official position that "[it] has probable cause to have [some]one arrested." *Buckley*, 509 U.S. at 274. *Burns* held that the functionally identical conduct "clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than [her] role as 'administrator or investigative officer.'" 500 U.S. at 491 (quoting *Imbler*, 424 U.S. at 430-431 & n.33). There is no basis in law or logic for according a prosecutor absolute immunity for presenting the evidence necessary to establish probable cause the day after an arrest, but not for making the same showing to the same court for the same purpose an hour before an arrest. See *Buckley*, 509 U.S. at 274 & n.5 (prosecutor's belief that probable cause exists weighs in favor of absolute immunity); *Roberts* v. *Kling*, 104 F.3d 316, 319 (10th Cir. 1997) ("Because defendant's actions [of filing a complaint and seeking an arrest warrant] followed a

probable cause determination, they are more closely associated with the judicial process and the prosecutorial function of an advocate for the state.").[9]

2. The prosecutor's submission of a complaint and request for an arrest warrant to a court, like her participation in a probable-cause hearing, "is 'intimately associated with the judicial phase of the criminal process,'" *Burns*, 500 U.S. at 492 (quoting *Imbler*, 424 U.S. at 430), and thus absolute immunity is needed to protect the integrity of the judicial process. The issuance of an arrest warrant based on a judicial finding of probable cause, like the issuance of the search warrant in *Burns*, "is unquestionably a judicial act." *Burns*, 500 U.S. at 492; see also *Forrester* v. *White*, 484 U.S. 219, 227 (1988) ("[T]he informal and *ex parte* nature of a proceeding has not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived of its judicial character.").

Even where a prosecutor's filing of a complaint and related papers is not part of the formal institution of a prosecution (*e.g.*, because no indictment has yet been returned or information filed), that action nevertheless commences a judicial proceeding to restrain the liberty of an individual pending the institution of formal criminal proceedings. The action is thus, at a minimum, closely

[9] The fact that this case involves an arrest warrant, rather than a search warrant (as in *Burns*), makes absolute immunity even more appropriate here. A search warrant necessarily contains an investigatory component, because its purpose is to facilitate the obtaining of evidence. An arrest warrant, by contrast, is more closely tied to the initiation of the actual criminal judicial process, because it provides a means for bringing the individual before the court, and execution of the warrant triggers judicially enforceable protections for the individual. See *Burns*, 500 U.S. at 505-506 (Scalia, J., concurring) (noting that application for search warrant is further removed from judicial process than request for arrest warrant).

interwoven with and predicative to the initiation of a prosecution. See *Buckley*, 509 U.S. at 272; *Marx* v. *Gumbinner*, 855 F.2d 783, 790 (11th Cir. 1988) ("The initial determination of whether such probable cause exists is a part of the larger process of determining whether to initiate a prosecution.").

The prosecutor's filing, moreover, sets in motion the criminal judicial process. The arrest warrant, when executed, brings the subject before the court and subjects him to its immediate authority, without which "the initiation of a prosecution would be futile." *Lerwill* v. *Joslin*, 712 F.2d 435, 438 (10th Cir. 1983); see also *Ehrlich* v. *Giuliani*, 910 F.2d 1220, 1223 (4th Cir. 1990) ("One of the most important duties of a prosecutor pursuing a criminal proceeding is to ensure that defendants * * * are present at trial.").[10]

While *Burns* involved a prosecutor's personal appearance to present argument and evidence to a court, absolute immunity applies with equal force to written evidentiary submissions and arguments. Like statements in the courtroom and the eliciting of testimony, a lawyer's written briefs and pleadings have historically been accorded absolute immunity. See *Imbler*, 424 U.S. at 426 n.23; see also *Butz*, 438 U.S. at 516 n.40. Given the substantial volume of judicial business that is transacted through written submissions by attorneys, it would make little sense to have immunity turn upon the form in which—rather than the function for which—a prosecutor submits arguments and evidence to a court. *Butz*, 438 U.S. at 516 n.40.

[10] The arrest also triggers statutory speedy trial protections. See *State* v. *Greenwood*, 845 P.2d 971 (Wash. 1993); see also 18 U.S.C. 3161(b).

3. Finally, absolute immunity must extend to the prosecutor's preparation and drafting of documents filed in court. In *Buckley*, this Court held that absolute immunity includes the prosecutor's "preparation" of "evidence assembled by the police" to present to a court. 509 U.S. at 273; see also *Peña* v. *Mattox*, 84 F.3d 894, 896 (7th Cir. 1996) (absolute immunity includes prosecutor's drafting of complaint). In preparing and drafting pleadings and their supporting documentation, the prosecutor is acting in an advocatory role. In preparing an affidavit, for example, a prosecutor is not acting as an advisor to the police: she is framing and controlling the presentation of evidentiary material to the court, just as she will select and plan the introduction of evidence throughout a criminal trial. To deny absolute immunity because of a prosecutor's involvement in the preparation of documents filed in court would allow a pleading device to circumvent absolute immunity. Plaintiffs would simply attack the preparation, rather than the submission to a court, of a complaint and request for arrest warrant.

D. Absolute Immunity In This Context Is Supported By Common Law Practice

While not necessarily dispositive, common law practice provides useful guidance in discerning what immunities should be recognized under 42 U.S.C. 1983. See, *e.g.*, *Imbler*, 424 U.S. at 417-418; cf. *Anderson* v. *Creighton*, 483 U.S. 635, 644-645 (1987). The precedent on the question presented in this case is not voluminous, in large part because the role of the public prosecutor has evolved substantially in the last century. See *Burns*, 500 U.S. at 499 (Scalia, J., concurring). Nevertheless, the existing case law supports according a prosecutor absolute immunity for obtaining an arrest warrant from a court, especially in conjunction with the filing of criminal

charges. See *Reilly* v. *United States Fidelity & Guaranty Co.*, 15 F.2d 314, 317 (9th Cir. 1926) (suit against district attorney for having plaintiff arrested without probable cause dismissed on grounds of absolute immunity); *Anderson* v. *Manley*, 43 P.2d 39, 40 (Wash. 1935) (prosecutor enjoys absolute immunity for criminal complaint issued on basis of false search warrant); *Kittler* v. *Kelsch*, 216 N.W. 898, 899-905 (N.D. 1927) (prosecutor enjoys absolute immunity from claim for false arrest based on filing of complaint that led to arrest warrant) (cited in *Imbler*, 424 U.S. at 422 n.19); cf. *Watts* v. *Gerking*, 228 P. 135, 138 (Or. 1924) (prosecutor enjoys absolute immunity from suit alleging malicious filing of complaint and procurement of search warrant) (cited in *Imbler*, 424 U.S. at 422 n.19); but see *Leong Yau* v. *Carden*, 23 Haw. 362, 364 (1916) (prosecutor denied absolute immunity for making false representations that resulted in issuance of arrest warrant) (cited but not followed in *Imbler*, 424 U.S. at 422 n.19).

Relatedly, a prosecutor's presentation of allegedly false evidence to a grand jury, which resulted in indictment and arrest, was accorded absolute immunity from suit in *Yaselli* v. *Goff*, 12 F.2d 396, 406 (2d Cir. 1926), aff'd mem., 275 U.S. 503 (1927). Cf. *Griffith* v. *Slinkard*, 44 N.E. 1001, 1002 (Ind. 1896) (prosecutor enjoys absolute immunity for adding plaintiff's name to indictment, which led to plaintiff's arrest) (cited in *Imbler*, 424 U.S. at 421).[11]

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[11] On the other hand, when a prosecutor instigated an arrest extrajudicially, common law courts were less willing to grant absolute immunity. See, *e.g.*, *Schneider* v. *Shepherd*, 158 N.W. 182, 184 (Mich. 1916). In addition, private attorneys who procured arrest warrants were also denied immunity. See, *e.g.*, *Teal* v. *Fissel*, 28 F. 351, 352 (E.D. Pa. 1886) (noting difference between public prosecutors and private attorneys); *Peck* v. *Chouteau*, 91 Mo. 138, 150 (1886); *Fischer* v.

Other cases described those same prosecutorial functions as "quasi-judicial" actions, which is a category of conduct to which the common law accorded absolute immunity. See *Smith* v. *Parman*, 165 P. 663, 663 (Kan. 1917) ("[T]he important matter of determining what prosecutions shall be instituted is committed in a considerable degree to his sound judgment, and in the exercise of that function he acts at least in a quasi judicial capacity"; "We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law.") (cited in *Imbler*, 424 U.S. at 422 n.19).[12] Indeed, in *Imbler*, this Court noted that "[c]ourts that have extended the same [absolute] immunity to the prosecutor have sometimes remarked on the fact that all three officials—judge, grand juror, and prosecutor—exercise a discretionary judgment on the basis of evidence presented to them." 424 U.S. at 423 n.20. The prosecutorial judgment to file a complaint and seek an arrest warrant on the basis of the investigative record compiled

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Langbein, 103 N.Y. 84, 89 (1886); *Burnap* v. *Marsh*, 13 Ill. 535, 538 (1852).

[12] See also *Pearson* v. *Reed*, 44 P.2d 592, 596-597 (Cal. Ct. App. 1935) ("A prosecutor is called upon to determine, upon evidence submitted to him, whether a criminal offense has been committed by the person accused—exactly the same question that is presented to a court or jury upon trial.") (cited in *Imbler*, 424 U.S. at 424); M.L. Newell, *A Treatise on the Law of False Imprisonment and the Abuse of Legal Process* § 68, at 166 (1892) ("when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a direction in its nature judicial, the function is termed *quasi*-judicial"; a quasi-judicial officer "cannot be called upon to respond in damages for the honest exercise of his judgment within his jurisdiction, however erroneous or misguided that judgment may be").

by the police is just that—a discretionary judgment on the basis of evidence presented to the prosecutor.

Finally, the common law granted absolute immunity (at least from defamation suits) to an attorney's filing of pleadings and advocatory documents with a court. See *Buckley*, 509 U.S. at 270; *Imbler*, 424 U.S. at 426 n.23; *Hoar* v. *Wood*, 44 Mass. 193, 197-198 (1841) ("[I]t is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions."); see also 1 T. Cooley, *Law of Torts* § 153 (4th ed. 1932); 1 F. Harper & F. James, *The Law of Torts* § 5.22 (1956). This "traditional defamation immunity is sufficient to provide a historical basis for absolute § 1983 immunity." *Burns*, 500 U.S. at 501 (Scalia, J., concurring).

E. The Policies Underlying Absolute Immunity Support Its Application In This Context

Recognition of absolute immunity for a prosecutor's request for an arrest warrant, when sought in conjunction with the filing of criminal charges, is necessary to protect the proper functioning of the criminal justice system. Like the determination to pursue a prosecution, a prosecutor's decision to file criminal charges and to bring the individual before the court by means of an arrest warrant is, by its nature, a highly discretionary judgment, often made under serious constraints of time, information, and concerns about public safety. See *Imbler*, 424 U.S. at 425. Those judgments may be difficult to defend and document years later when scrutinized through the 20/20 hindsight of a civil damages trial. *Id.* at 425-426 ("Defending these decisions, often years after they were made, could impose

unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.").

Prosecutors, moreover, serve a unique function within the adversarial judicial system:

> The prosecuting attorney is a very responsible officer, selected by the people, and vested with personal discretion intrusted to him as a minister of justice, and not as a mere legal attorney. * * * He is expected to be impartial in abstaining from prosecuting as well as in prosecuting, and to guard the real interests of public justice in favor of all concerned.

Engle v. *Chipman*, 16 N.W. 886, 887 (Mich. 1883); see also *Berger* v. *United States*, 295 U.S. 78, 88 (1935) (United States Attorney is a "servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer"). A prosecutor cannot properly fulfill those duties if the risk of personal damages liability weighs in the balance with every filing of a complaint or information and motion for issuance of an arrest warrant. *Imbler*, 424 U.S. at 424-425.

In *Imbler*, this Court recognized the importance of insulating from suit a prosecutor's decision to go forward with a prosecution. 424 U.S. at 424-429. It is equally important that a prosecutor's decision to withdraw charges after an arrest, and thereby to protect those subsequently deemed innocent, be accorded protection from civil liability. See *Appeal of Nicely*, 18 A. 737, 738 (Pa. 1889) ("[I]t is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes."); see also *United States* v. *Lovasco*, 431 U.S. 783, 794-795 & n.15 (1977). Withholding absolute immunity from the decision to charge and arrest, however, would leave a decision to withdraw prosecution vulnerable, and

would allow plaintiffs to challenge a decision to prosecute simply by restyling their complaints as attacks on the initial decision to file a complaint and seek an arrest warrant. See *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves."). Because "pretrial court appearances by the prosecutor"—whether in person or through the filing of pleadings—"in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor," absolute immunity is warranted. *Burns*, 500 U.S. at 492.

Absolute immunity does not leave arrested individuals unprotected. The arrest triggers judicial procedures that protect against abuse, including "one of the most important checks, the judicial process" itself. *Burns*, 500 U.S. at 496. In the federal context, the Speedy Trial Act requires that an indictment or information be filed within 30 days of an arrest on a complaint. 18 U.S.C. 3161(b); see also Fed. R. Crim. P. 5(c) (right to a preliminary hearing within a specified time period when arrested on a complaint); *State* v. *Greenwood*, 845 P.2d 971 (Wash. 1993). In addition, the complaint and other documents filed with the court in this case were each signed by the prosecutor (J.A. 13-20), making her subject to the court's inherent power to punish false representations by members of the bar. See *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). The certification in support of the arrest warrant was filed under oath, making the prosecutor subject to perjury charges for intentionally false statements. Wash. Rev. Code §§ 9A.72.020, 9A.72.030 (1996). Prosecutors who intentionally violate an individual's constitutional rights are

subject to prosecution under 18 U.S.C. 242; cf. *United States* v. *Lanier*, 117 S. Ct. 1219 (1997). Finally, as this Court recognized in *Imbler*, prosecutors face unparalleled scrutiny and review by their professional peers. 424 U.S. at 429. Accordingly, the imposition of personal damages liability is not the sole means available for ensuring that prosecutors act within constitutional limits when filing or approving complaints and motions for the issuance of arrest warrants. See *Imbler*, 424 U.S. at 429.

F. Affording Absolute Immunity In This Case Would Be Consistent With *Malley* v. *Briggs*

1. Affording absolute immunity to prosecutors for procuring arrest warrants in conjunction with the filing of criminal charges is consistent with this Court's decision in *Malley* v. *Briggs*, 475 U.S. 335 (1986). *Malley* held that police officers do not enjoy absolute immunity when they request an arrest warrant from a court. The court below concluded that it would be inequitable to afford prosecutors absolute immunity for "the same task." Pet. App. 6a. That conclusion, however, misunderstands how the functional analysis underlying immunity doctrine operates.

Functional analysis does not stop with a description of the conduct at issue. If it did, the questioning of crime witnesses would always enjoy only qualified immunity, regardless of whether the questioning was done by a police officer investigating a crime, a prosecutor preparing for trial, or a judge in court. Cf. *Buckley*, 509 U.S. at 273 (absolute immunity protects prosecutor's preparation for the presentation of evidence at trial); *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967) (absolute immunity for judges for acts committed within their jurisdiction). Likewise, the prosecutor's application for a search warrant in *Burns* would have been denied absolute immunity, because the

same conduct performed by a police officer warrants only qualified immunity. Compare *Burns*, 500 U.S. at 491, with *Burns*, 500 U.S. at 505 n.2 (Scalia, J., concurring), and *Malley*, 475 U.S. at 340-345. The court of appeals' observation that both prosecutors and police officers may request arrest warrants thus should not have terminated the absolute immunity inquiry. See *Roberts*, 104 F.3d at 321 ("[T]he acts themselves are not the focus of the functional approach * * *. Instead we examine the function a defendant's acts serve."); see also *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part) ("Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions.").

The function of an official's conduct must be assessed in light of its purpose and role within the overall context of the criminal process. While the official's title is not dispositive, *Buckley*, 509 U.S. at 269, the court of appeals erred in concluding that an actor's professional responsibilities are altogether irrelevant. The role of a governmental actor is relevant to assessing the purpose and context of the challenged conduct. Indeed, immunity doctrine evolved from an acknowledgment that "some officials perform 'special functions,'" *id.* at 268, and so the immunity inquiry begins by "examin[ing] the nature of the functions with which a particular official or class of officials has been lawfully entrusted." *Forrester*, 484 U.S. at 224; cf. *Wyatt* v. *Cole*, 504 U.S. 158, 163-169 (1992) (private defendants generally enjoy no immunity from suit). For that reason, *Malley* expressly warned against incautious comparisons of the activities of prosecutors and police officers. 475 U.S. at 342-343; *Ehrlich*, 910 F.2d at 1224.

A prosecutor's request for an arrest warrant in conjunction with the filing of criminal charges performs a

function that is separate and distinct from the police officer's request in *Malley*. The former, unlike the latter, reflects the official legal judgment of the attorney for the government that an individual is to be charged with a crime, and it is closely intertwined with or preparatory to the formal initiation of a prosecution. In this case, for example, the prosecutor filed a motion for issuance of an arrest warrant along with her filing of the information, which under Washington law represents the actual initiation of a criminal prosecution. Initiating a prosecution is a function confined to prosecutors; a police officer's application for an arrest warrant could not accomplish that function without the prosecutor's concurrence that a prosecution would serve the public interest. Cf. *Lovasco*, 431 U.S. at 794. Nor does a police officer, in seeking an arrest warrant, purport to speak as an advocate or as an officer of the court. The police officer's procurement of an arrest warrant therefore is "further removed from the judicial phase of criminal proceedings" than the prosecutor's. *Malley*, 475 U.S. at 342.

Furthermore, although there is a common law predicate for according a prosecutor absolute immunity for procuring arrest warrants, see pages 18-21, *supra*, no such tradition existed for police officers. *Malley*, 475 U.S. at 342; *Butz*, 438 U.S. at 496 ("[T]he common law has never granted police officers an absolute and unqualified immunity.") (quoting *Pierson*, 386 U.S. at 555).[13]

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[13] In addition, as the Court noted in *Malley*, 475 U.S. at 343 n.5:

> The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 U.S., at 429 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

2. Respondent contends (Br. in Opp. 7-28) that *Malley* controls because petitioner acted, not as a prosecutor, but as a complaining witness when she signed the certification for the determination of probable cause. *Malley* denied the police officer absolute immunity in part because "complaining witnesses were not absolutely immune at common law." 475 U.S. at 340. For two reasons, however, this case does not appear to present the question whether absolute immunity would attach if a prosecutor acted solely as a complaining witness.

First, petitioner did not purport to offer firsthand knowledge of the facts contained in the certification. She informed the court at the opening of her certification that the recitation of facts was based on her "familiar[ity] with the police report and investigation." J.A. 19; cf. *Malley*, 475 U.S. at 337-338. Petitioner, in other words, did not present herself as a percipient witness with firsthand knowledge of the underlying facts or in the traditional role of a complaining witness.[14] Rather, in this setting, the certification appears most analogous to an attorney's proffer of evidence to a court of the facts developed by the police in their investigation, combined with the legal judgment that the proffered (certified) evidence demonstrated probable cause to charge and arrest respondent for purposes of bringing him under the control of the court and initiating a prosecution. See *Gerstein*, 420 U.S. at 120 (probable cause may be shown through informal modes of

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[14] Her position is thus different from that of a police officer serving as a complaining witness based on his personal involvement in or responsibility for the investigation that led to the charges. Petitioner did not profess to speak as an investigator or person otherwise involved in the investigation.

proof); see also Wash. Crim. R. 2.2 (court does not require that complaining witnesses personally appear in support of warrant application, although court may call them or others if it chooses). Had petitioner made such a proffer when acting as an attorney for the government in a probable-cause or bail hearing, she no doubt would have enjoyed absolute immunity for her statements. See *Burns*, 500 U.S. at 487-491; see also note 4, *supra*. Neither this Court's precedents nor the nature of functional analysis justifies granting absolute immunity to a prosecutor's oral statements to a court, while denying such protection simply because the identical material was conveyed to the same court for the same purpose in a written certification under oath.

Second, the documents filed by petitioner were presented as a package to the court as a formal means of instituting the actual criminal prosecution of respondent. Because that function as a whole should be accorded absolute immunity, the process should not be dissected paper by paper, with immunity granted or denied based on the content of individual documents. Cf. *Schrob* v. *Catterson*, 948 F.2d 1402, 1416 (3d Cir. 1991) (in forfeiture cases, "the seizure warrant is an integral part of the forfeiture complaint and the decisions to file the complaint and seek the warrant should be considered as one" for purposes of absolute immunity).

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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APRIL 1997

No. 96-792

IN THE
Supreme Court of the United States
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LYNNE KALINA,
Petitioner,
v.
RODNEY FLETCHER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity in a suit under 42 U.S.C. § 1983 for her conduct in seeking an arrest warrant for the purpose of bringing a criminal defendant before the court.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments.

One of the core functions of state and local governments is the enforcement of the criminal law through the office of the public prosecutor.

The public prosecutor serves a central role in the administration of criminal justice. As the State's advocate, "[a] prosecutor is duty bound to exercise his best judgment both in deciding which [cases] to bring and in conducting them in court." *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976). Public prosecutors, however, "[f]requently act[] under serious constraints of time and even information" as they are routinely "responsible . . . for hundreds of indictments and trials." *Id.* at 425-26. Both the common law and this Court have thus recognized that public prosecutors are entitled to absolute immunity for their role in initiating and conducting a prosecution. *Id.* at 421-31.

The conduct at issue here, involving a prosecutor's act of seeking an arrest warrant to secure the presence in court of a person formally charged with a crime, is fully within the scope of the absolute immunity previously recognized by the common law and this Court. A felony prosecution cannot go forward without the presence of the accused. *See Crosby v. United States*, 506 U.S. 255, 259 (1993). Seeking an arrest warrant for the purpose of compelling a defendant to appear in court and answer criminal charges is thus as integral to the initiation and conduct of a prosecution as is filing an information or seeking an indictment. The court of appeals' holding that this conduct is not within the scope of absolute immunity would have as harmful an impact on the administration of criminal justice as would denying

prosecutors' absolute immunity for the conduct at issue in *Imbler*.

Because the court of appeals' holding has serious consequences for the administration of criminal justice, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt petitioner's statement.

SUMMARY OF ARGUMENT

1. This Court has "held that prosecutors are absolutely immune for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). The scope of prosecutorial immunity established by this Court's precedents fully encompasses Kalina's conduct in seeking an arrest warrant in conjunction with the initiation of a criminal prosecution against Fletcher.

In its analysis of prosecutorial immunity in *Imbler*, the Court carefully examined the common law, which has long held that prosecutors, like judges and grand jurors acting within the scope of their duties, have absolute immunity for their role in initiating and conducting a prosecution. 424 U.S. at 421-24. The common law immunity of prosecutors is founded on the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. *Imbler* held that these concerns "dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law." *Id.* at 427.

The court of appeals ignored these controlling principles and erroneously analogized Kalina's conduct to that of a police officer seeking an arrest warrant in connection with an investigation, who is entitled only to qualified immunity. *See Malley v. Briggs*, 475 U.S. 335 (1986). While ostensibly invoking this Court's " 'functional' analysis," J.A. 25, the court of appeals overlooked that "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.' " *Mireles v. Waco*, 502 U.S. 9, 13 (1991) (per curiam) (citation omitted). The function served by Kalina's motion for an arrest warrant was not the same as the function served by the arrest warrants in *Malley*.

The *Malley* warrants were sought as part of a criminal investigation; when the State presented the case to the grand jury it refused to return an indictment. In contrast, Kalina's purpose in preparing the certification in support of her motion for an arrest warrant was to compel Fletcher to appear in court to respond to the formal charges that had been filed against him. The information filed by Kalina did not compel Fletcher's presence in the courtroom. Because fundamental principles of criminal justice generally forbid trial *in absentia*, the filing of the motion for an arrest warrant and certification was an essential step in the commencement of the prosecution. The warrant and the underlying certification were thus an integral part of the initiation of the prosecution and

were in every sense "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *Lerwell v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983).

Fletcher erroneously contends that Kalina's challenged conduct arose out of her acting as a "complaining witness" in the same manner as a police officer or any citizen. As a prosecutor, Kalina was vested by state law with authority to determine whether complaints filed by citizens or police officers warranted the filing of criminal charges by the State. Thus, in preparing and filing her certification, Kalina was functioning as a "quasi-judicial officer," *Imbler*, 424 U.S. at 423 n.20, who is entitled to absolute immunity.

Although Fletcher suggests otherwise, *see* Opp. 14-18, there is an additional common law doctrine that supports immunity for Kalina in this case—the well-settled privilege of an attorney for conduct occurring during the course of judicial proceedings. This common law privilege covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." William L. Prosser, *Handbook of the Law of Torts* § 94, at 824 (1941) (citations omitted). It immunizes Kalina from suit at common law for allegedly making "false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution." J.A. 5 (Complaint ¶ 3.3). The common law tradition thus supports absolute immunity for Kalina's acts in preparing and filing the probable cause certification.

2. The *Imbler* Court supported its holding not only by an analysis of the common law of prosecutorial

immunity, but also by its conclusion that the "considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S. at 424. The same considerations of public policy that led to *Imbler*'s holding that absolute immunity was available to the prosecutor in that case support the recognition of absolute immunity for a prosecutor's act of seeking an arrest warrant in conjunction with the filing of criminal charges.

Just as the Court recognized in *Imbler*, denying Kalina absolute immunity would expose prosecutors to burdensome and distracting lawsuits. Subjecting prosecutors to suit for seeking a warrant in conjunction with the filing of charges would divert their time and attention "from the pressing duty of enforcing the criminal law." 424 U.S. at 425. As long as a suspect was not in custody at the time the prosecution was initiated, every prosecutor who failed to obtain a conviction would bear a substantial risk of being sued for her conduct in seeking a warrant. Not only would such litigation adversely affect the way in which prosecutors allocate their time, it would pressure prosecutors to engage in self-protective behavior antithetical to the fearless discharge of their responsibilities. *Id.* at 423-24.

While respondent's argument is couched in terms of Kalina's alleged "false statements" made "with reckless disregard for the truth," J.A. 5, the impact of an affirmance of the court of appeals would not be limited to such cases. Denying prosecutors absolute immunity for seeking arrest warrants in conjunction with the filing of criminal charges would subject them to suit simply for making mistakes in evaluating police files. This is of no small moment given both

the large number of prosecutions that end in dismissal or acquittal and the fact that "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler*, 424 U.S. at 425.

Other mechanisms exist to protect against the potential abuse of prosecutorial powers in filing for arrest warrants. Not only did Kalina, pursuant to state law, attest to the truthfulness of the assertions in her certification "[u]nder penalty of perjury," J.A. 20, prosecutors are subject to criminal prosecution under 18 U.S.C. § 242 for willful deprivations of constitutional rights. In addition, all prosecutors are subject to bar discipline for violating the rules of professional conduct. *See Imbler*, 424 U.S. at 429. "These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.*

ARGUMENT

A PROSECUTOR IS ENTITLED TO ABSOLUTE IMMUNITY FOR SEEKING AN ARREST WARRANT IN ORDER TO COMPEL A CRIMINAL DEFENDANT TO ANSWER CHARGES

This Court has long recognized that "prosecutors are absolutely immune for their conduct in 'initiating a prosecution and in presenting the State's case,' insofar as that conduct is 'intimately associated with the judicial phase of the criminal process.'" *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)); *see also Yaselli v. Goff*, 275 U.S. 503 (1927) (per curiam). The Court has further explained that the prosecutor's absolute immunity extends to "'the duties of the

prosecutor in his role as advocate for the State [and] involve[s] actions preliminary to the initiation of a prosecution and actions apart from the courtroom.' " *Buckley v. Fitzsimmons*, 509 U.S. 259, 272 (1993) (quoting *Imbler*, 424 U.S. at 431 n.33).

The court of appeals ignored these precedents. Instead, it relied on *Malley v. Briggs*, 475 U.S. 335 (1986), which rejected a police officer's claim that he was entitled to absolute immunity for seeking an arrest warrant during the course of a criminal investigation. According to the court of appeals, "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*." J.A. 27. Failing to consider the function served by the warrant which Kalina sought, the court concluded that "[t]o hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis." *Id.*

As explained below, the court of appeals erred in disregarding this Court's precedents clearly establishing that Kalina is absolutely immune for seeking an arrest warrant in order to compel Fletcher's appearance in court to answer criminal charges. Where, as here, a warrant is sought as part of the initiation of a criminal prosecution, a prosecutor is entitled to absolute immunity; *Malley* is not controlling. To hold otherwise would have grave consequences for the administration of criminal justice. The Court should therefore reverse the judgment below.

A. Under *Imbler*, A Prosecutor Is Entitled To Absolute Immunity For Her Conduct In Initiating A Criminal Prosecution

Notwithstanding its "literal sweep," Section 1983 did not abrogate those immunities which are " 'well grounded in history and reason.' " *Imbler*, 424 U.S. at 417-18 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). In determining whether an official is entitled to immunity, the Court conducts "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Id.* at 421.

In *Imbler* the Court extensively examined the common law of prosecutorial immunity. *See* 424 U.S. at 421-24. As the Court explained, the common law deemed prosecutors to be quasi-judicial officers who were entitled to absolute immunity for their role in initiating and conducting a criminal prosecution. *See id.* Moreover, the Court concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." *Id.* at 424.

As the Court recognized, a public prosecutor's duties are unique. A prosecutor is routinely assigned a large caseload and "inevitably makes many decisions that could engender colorable claims of constitutional deprivation" in initiating and conducting a criminal prosecution. *Id.* at 425. Because "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate," suits against prosecutors "could be expected with some frequency" and "could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds

of indictments and trials." *Id.* at 425-26. As the Court noted, "[t]he public trust of the prosecutor's office would suffer" and prosecutors' "energy and attention would be diverted from the pressing duty of enforcing the criminal law" if they were not entitled to absolute immunity for their conduct in initiating and conducting a prosecution. *Id.* at 424-25.

The Court further explained that "affording . . . only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Id.* at 426. Absolute immunity is essential to the criminal justice system's "goal of accurately determining guilt or innocence"; it encourages the prosecutor to present relevant evidence to the trier of fact. *Id.* Moreover, absolute immunity benefits criminal defendants in that "[t]he possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 427 n.25. Finally, the Court recognized that absolute immunity ensures that the focus of post-trial review will "not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Id.* at 427.

Imbler thus held "that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431. This immunity is absolute and extends to all those activities which are "intimately associated with the judicial phase of the criminal process," *id.* at 430, and includes "actions preliminary to the initiation of a prosecution and actions apart from the courtroom." *Id.* at 431 n.33.

Subsequent to *Imbler* the Court has held that a prosecutor is entitled only to qualified immunity for "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273. The Court, however, has steadfastly adhered to its holding in *Imbler*. *See id.; see also Burns*, 500 U.S. at 487-92. As the Court stated in *Buckley*:

> We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.

509 U.S. at 273.

The court of appeals ignored these precedents. Instead, it reasoned that "Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*," and that "[t]o hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis." J.A. 27.

The court of appeals' reasoning is flawed. It erroneously assumes, without any analysis, that the purposes served by the arrest warrant sought by the police officer in *Malley* and the arrest warrant sought by Kalina are the same. But as this Court has explained, "the relevant inquiry is the 'nature' and 'function' of the act, not the 'act itself.'" *Mireles v.*

Waco, 502 U.S. 9, 13 (1991) (per curiam) (quoting *Stump v. Sparkman*, 435 U.S. 349, 362 (1978)). *See also Roberts v. Kling*, 104 F.3d 316, 321 (10th Cir. 1997) ("[T]he acts themselves are not the focus of the functional approach. Instead, we examine the function a defendant's acts serve.").

In *Malley* the Court rejected a police officer's contention that he was entitled to absolute immunity for procuring arrest warrants during the course of a criminal investigation. 475 U.S. 337-45. The arrest warrants, however, were not sought following the returning of an indictment or filing of an information. Indeed, after the arrests of the respondents in *Malley*, a grand jury refused to indict them. *Id.* at 338. The case thus clearly involved conduct occurring in the exercise of the investigative function. As the Court explained in rejecting the officer's analogy between himself and a prosecutor:

> We intend no disrespect to the officer applying for a warrant by observing that his action, while a vital part of the administration of criminal justice, is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment. Furthermore, petitioner's analogy, while it has some force, does not take account of the fact that the prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction.

475 U.S. at 342-43.

In contrast to the warrant at issue in *Malley*, Kalina had filed a criminal information charging Fletcher with a felony offense simultaneously with seeking the arrest warrant. *See* J.A. 13. Her purpose in preparing the certification for determination of probable cause and filing for the warrant was to compel Fletcher to respond in court to a formal criminal charge. *See id.* at 14. Indeed, Kalina would have been remiss in her duties under state law if she had not procured a warrant. *See* Wash. Rev. Code § 36.27.020(6). The warrant was thus an integral part of the initiation of a criminal prosecution and was in every sense "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *see also Buckley*, 509 U.S. at 273 ("acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity").

As the Tenth Circuit has explained:

> [A] prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of prosecution" under *Imbler*.

Lerwill v. Joslin, 712 F.2d 435, 438 (10th Cir. 1983). *See also Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1995); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549, 555-56 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Ehrlich v. Giuliani*, 910 F.2d 1220, 1223-24 (4th Cir. 1990).

To hold otherwise is to ignore the most fundamental principles of the criminal justice system. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372 (1892). The Confrontation Clause of the Sixth Amendment generally guarantees "the accused's right to be present in the courtroom at every stage of his trial," *Illinois v. Allen*, 397 U.S. 337, 338 (1970), and the Due Process Clause provides a criminal defendant with the "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). As a general matter, fundamental principles of criminal justice forbid trial *in absentia*. *See Crosby v. United States*, 506 U.S. 255, 259 (1993) ("It is well settled that . . . at common law the personal presence of the defendant is essential to a valid trial and conviction on a charge of felony. . . . If he is absent . . . a conviction will be set aside.") (quoting W. Mikell, *Clark's Criminal Procedure* 492 (2d ed. 1918)).

Moreover, neither the seeking and returning of an indictment nor the filing of an information compels the physical presence of a criminal defendant in court to answer the charge. As the Court noted in *Malley*, the act of obtaining an indictment or filing an information "is but the first step in the process of seeking a conviction." 475 U.S. at 343. Ancillary to the process of seeking a conviction is the act of obtaining the presence of the defendant in court for purposes of

holding the arraignment, setting bond and fixing the date for trial. The court of appeals' implicit conclusion that Kalina's conduct in seeking Fletcher's arrest is not "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, thus reflects a fundamental disregard of the operation of the criminal justice system.

That under Washington law "[a] defendant's presence can be obtained by summons as well as by arrest," Opp. at 10 n.5, does not alter the nature of the function a prosecutor performs in seeking an arrest warrant in conjunction with the initiation of formal criminal charges. A summons is generally not an appropriate mechanism for compelling the presence of persons accused of serious crimes, especially those involving the commission of bodily harm to other persons. *See* Wash. Crim. R. 2.2(b)(3). Moreover, a summons may be ineffective in securing a defendant's presence either because the defendant has moved and does not receive it or chooses to ignore it.

Thus, in many instances the prosecutor may have no choice but to seek the issuance of an arrest warrant if the State's case is to go forward.[2] The decision whether an accused poses a danger to others or is unlikely to respond to a summons is surely one which is committed to the prosecutor's discretion. And in preparing the necessary documents and appearing before a magistrate in order to obtain a warrant for the arrest of a person charged with a serious crime,

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[2] In this case, the King County prosecutor repeatedly attempted to inform Fletcher by letters of the pending charges and the date of his arraignment. The warrant was executed nine months after its issuance and only after these letters did not result in Fletcher's appearance. J.A. 6, 12.

a prosecutor is engaged in classic advocacy on behalf of the State. *Cf. Burns*, 500 U.S. at 491 ("appearing before a judge and presenting evidence in support of a motion for a search warrant . . . clearly involve the prosecutor's 'role as advocate for the State' ") (quoting *Imbler*, 424 U.S. at 430-31).

Ignoring Kalina's function in filing for the arrest warrant, respondent instead asserts that her actionable conduct arose out of her "acting as a complaining witness." Opp. at 8. According to respondent, the certification "could as easily have been performed by 'a police officer or complaining witness.' " *Id.* (quoting Pet. App. 6a). Respondent further states that "[u]nder Washington law, any citizen can be a complaining witness," and that "[t]he nature of the 'conduct' at issue here—swearing to facts as a complaining witness—does not change according to the witness' official title." *Id.* at 12-13. *See also* Opp. at 4 (in preparing the probable cause certification, Kalina "took on a distinct role . . . of a 'complainant' or 'witness' ").[3]

[3] Respondent's assertion that Kalina acted as a "complaining witness" is mistaken. In preparing the probable cause certification, Kalina was merely relating the statements of others as contained in the police report; she did not profess to have first-hand knowledge of the facts set forth in the certification and would not have testified either at the warrant hearing or in a subsequent trial. *See* Pet. App. 17a (opening sentence of the certification) ("Lynn Kalina is a Deputy Prosecuting Attorney . . . and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054; . . . this case contains the following upon which this motion for the determination of probable cause is made.").

Relating the statements of others in a court filing in order to persuade a tribunal to rule the desired way is, of course,

This argument is flawed. It ignores that in applying for the warrant, Kalina did not stand in the same shoes as "any citizen" or a police officer. As the Court recognized in *Imbler*, the common law deemed a public prosecutor to be a "quasi-judicial officer" required to exercise discretion and independent judgment in determining whether to charge a person with a crime. *See* 424 U.S. at 423 n.20; *see also Malley*, 475 U.S. at 342-43. The Court endorsed this view in holding that the prosecutor's immunity as a quasi-judicial officer extended to Section 1983 actions. *See Imbler*, 424 U.S. at 424-29. As a public prosecutor, Kalina was vested by state law with authority to determine whether the complaints filed by "any citi-

classic advocacy. It is functionally indistinguishable from a lawyer's "making false or defamatory statements in judicial proceedings" or "eliciting false and defamatory testimony from witnesses," conduct which is absolutely immune under the common law and § 1983. *Burns*, 500 U.S. at 489-90. Moreover, the common law immunity extends to written statements as well. As a leading authority explains, the immunity covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." William L. Prosser, *Handbook of the Law of Torts* § 94, at 824 (1941) (citations omitted).

That Kalina certified that the statements made in the probable cause certification were "true and correct," Pet. App. 18a, does not demonstrate that she acted as a witness rather than the State's advocate. Lawyers routinely certify that the statements contained in the documents they file are correct; these acts do not transform them from advocates to witnesses. *Cf.* Fed. R. Civ. P. 11 ("[b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, . . . the allegations and other factual contentions have evidentiary support").

zen" or a police officer warrant the initiation of formal criminal charges. It is thus disingenuous to suggest that Kalina acted in the same functional capacity as "any citizen" or a police officer in preparing and filing the documents necessary to effectuate Fletcher's arrest. *Cf. Wyatt v. Cole*, 504 U.S. 158, 164-65 (1992) ("although public prosecutors and judges were accorded absolute immunity at common law, such protection did not extend to complaining witnesses who [as private parties] set the wheels of government in motion by instigating a legal action") (citation omitted). Denying absolute immunity for this conduct, which is so "intimately associated" with the initiation of a criminal prosecution that without it the case cannot go forward, would circumvent *Imbler*.[4]

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[4] The court of appeals also asserted that *Buckley* supported its holding that Kalina is not entitled to absolute immunity, presumably relying on the portion of the opinion discussing a prosecutor's immunity for conduct occurring while performing investigative functions. *See* J.A. 25-26; *see also Buckley*, 509 U.S. at 275 ("it would be anomalous . . . to endow [prosecutors] with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested").

Be that as it may, Kalina was not performing an investigative function when she sought Fletcher's arrest. Rather, she was engaged in the initiation of a criminal prosecution. Whether or not probable cause actually existed to believe Fletcher committed the crime is irrelevant; the absolute immunity recognized in *Imbler* encompasses claims that charges have been initiated without probable cause. *See* 424 U.S. at 421-24 (discussing *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *affirmed*, 275 U.S. 503 (1927) (per curiam), and *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896)); *see also Buckley*, 509 U.S. at 275 n.5 ("we have found a common-law tradition of

Contrary to respondent's suggestion, *see* Opp. at 14-18, Kalina can point to a common law tradition demonstrating that her conduct is absolutely immune —the well-settled immunity of the attorney for conduct occurring during the course of judicial proceedings. As the Court observed in *Burns*, "prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . . and also for eliciting false and defamatory testimony from witnesses." 500 U.S. at 489-90. Moreover, the common law immunity covers "anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." Prosser, *supra*, § 94, at 824 (citations omitted); *see also* Thomas M. Cooley, *The Elements Of Torts* 69 (1895) ("Pleadings and other papers filed by parties in the course of judicial proceedings are privileged; and so are affidavits made for commencing proceedings before magistrates, and the preliminary proceedings and information taken or given for bringing supposed guilty parties to justice.") (footnotes omitted); 7 William Wait, *Actions and Defenses* § 2,

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immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not").

It would thus be anomalous to hold that Kalina's decision to file charges is absolutely immune, but her companion decision to seek the issuance of an arrest warrant in order to proceed with the prosecution of those charges is not. Indeed, in both *Griffith* and *Yaselli*, which held that the prosecutors were absolutely immune, the plaintiffs alleged that the prosecutor had, following the indictment, caused their arrests without probable cause. *See Griffith*, 44 N.E. at 1002; *Yaselli*, 12 F.2d at 397. Neither case differentiated between the prosecutor's conduct in obtaining the indictment and causing the arrest. *Buckley* thus does not support the court of appeals' decision.

at 437 (1885).[5] The common law privilege thus fully encompasses the allegations respondent offers as the basis for his suit—that in the probable cause certification, "Kalina made false statements about Rodney Fletcher, with reckless disregard for the truth, knowing that her certification would result in Mr. Fletcher's arrest and prosecution." J.A. 5 (Complaint ¶ 3.3); *see also id.* at 5-6 (Complaint ¶¶ 3.4-3.7); Opp. at 1 ("Mr. Fletcher's allegation has always been limited to Ms. Kalina's separate and distinct action in 'prepar[ing] and fil[ing] a Certification for Determination of Probable Cause.'") (quoting Complaint).

In preparing the probable cause certification and filing it in court, Kalina functioned as an attorney for the State. She is thus entitled to the same absolute immunity which the common law has long conferred on attorneys for their role in judicial proceedings. *See Burns*, 500 U.S. at 489-91; Prosser, *supra*, § 94, at 824. And as explained below, the policy considerations which underlie the common law rule are equally applicable to § 1983 actions.

B. Absolute Immunity For Procuring An Arrest Warrant To Obtain The Presence Of A Person Charged With A Crime Is Necessary To Prevent Impairment Of The Criminal Justice System

Having determined that prosecutors were immune under the common law for their role in initiating and conducting a prosecution, the *Imbler* Court next concluded that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983." 424 U.S.

[5] *See also Kemper v. Fort*, 219 Pa. 85, 90 (1907); *Maulsby v. Reifsnider*, 69 Md. 143 (1888); *Burke v. Ryan*, 36 La. Ann. 951 (1884); *Hart v. Baxter*, 47 Mich. 198 (1881).

at 424. The very reasons that led to *Imbler*'s conclusion that absolute immunity applied to the prosecutor's conduct in that case support the recognition that absolute immunity applies to a prosecutor's act of seeking an arrest warrant in conjunction with the filing of criminal charges.

The *Imbler* Court first reasoned that given the frequency with which criminal defendants could sue prosecutors who had only qualified immunity, "the threat of § 1983 suits would undermine [the prosecutor's] performance of his duties" by constraining the prosecutor's decision-making for fear of "his own potential liability" and diverting his energy and attention to defend against such suits. *Id.* Second, affording prosecutors only qualified immunity "could have an adverse effect upon the functioning of the criminal justice system" by, among other things, limiting the prosecutor's discretion in the presentation of evidence by exposing prosecutors to potential civil liability for reliance on testimony later shown to be untruthful. *Id.* at 426. Finally, "[t]he ultimate fairness of the operation of the system itself could be weakened" by shifting the focus of post-trial proceedings away from whether the accused has received a fair trial to whether the prosecutor should be "called upon to respond in damages for his error or mistaken judgment." *Id.* at 427. Each of these considerations supports the conferral of absolute immunity on Kalina for her conduct in seeking an arrest warrant.

First, and foremost, just as in *Imbler*, denying Kalina absolute immunity would expose public prosecutors to burdensome and distracting lawsuits. While some States still require that felony prosecutions be initiated by grand jury indictment or may require that prosecutions for certain types of felonies be ini-

tiated through indictment, a majority of the States now allow for even felony prosecutions to be initiated by information. *See* 1 Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 6:37, at 220 (1986). Indeed, most criminal prosecutions are now initiated by information or complaint. Moreover, criminal suspects are frequently not in custody at the time a prosecutor reviews a police investigation and decides that charges should be filed.

Exposing public prosecutors to suit for seeking a warrant upon deciding to file charges would thus divert the time and attention of prosecutors "from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, to defending themselves against potentially numerous lawsuits. So long as a suspect was not in custody at the time the prosecution was initiated, every prosecutor who fails to obtain a conviction bears a substantial risk of being sued for her conduct in seeking a warrant. Like the prosecutor in this case, those who upon further review admit that their initial charging decision was mistaken can expect to be sued in every case.[6]

Such suits will adversely affect the way in which prosecutors allocate their time. Because the burdens of discovery and trial are onerous, prosecutors will

[6] Respondent mistakenly asserts that there is "no factual basis for Petitioner's concern that the decision below will result in a flood of litigation." Opp. at 24. That there have been few suits challenging this type of prosecutorial conduct is a reflection of the legal culture's understanding of the scope of prosecutorial immunity. *See Imbler*, 424 U.S. at 421-22 (discussing *Griffith*, 44 N.E. at 1002, which dismissed a false arrest claim brought against a prosecutor). It is not an indicator of the likelihood of such suits if the scope of the prosecutor's absolute immunity is altered to allow them.

spend more time defending themselves in depositions and trials and less time performing the vital function of protecting the public by prosecuting criminal offenders. Second, prosecutors will resort to various mechanisms of self-protective behavior which are of little benefit to society. One likely result is that prosecutors will present more cases to grand juries, notwithstanding the time-consuming nature of such proceedings, so that they can rely on the indictment to shield them from liability for seeking an arrest warrant. *See Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975) (citing *Ex parte United States*, 287 U.S. 241, 250 (1932)).

To be sure, prosecutors could engage in the self-protective device of "us[ing] the testimony of police officers or other witnesses, instead of their own, to support their warrant applications." Opp. at 26. But respondent's suggestion that the use of such affidavits would "insure a wrongly arrested citizen has recourse for any deliberate or reckless falsehood," *id.* at 27, ignores the consequences of depriving prosecutors of absolute immunity. If prosecutors were to use the testimony of police and other witnesses to support their warrant applications, it is a likely consequence of the Ninth Circuit's approach to functional analysis that prosecutors would be sued for allegedly relying upon insufficient affidavits or unreliable witnesses and informants in seeking an arrest warrant. *See, e.g., Malley*, 475 U.S. at 344-45; *Imbler*, 424 U.S. at 426. *Cf. Illinois v. Gates*, 462 U.S. 213 (1983). Prosecutors could also find themselves subject to suit for having obtained arrest warrants on the basis of evidence which was subsequently suppressed.

Moreover, even under the qualified immunity standard as reformulated in *Harlow v. Fitzgerald*, 457 U.S.

800 (1982), plaintiffs would frequently be able to subject prosecutors to burdensome depositions. The burden of defending themselves from such suits, which are nothing more than a backhanded way to subject prosecutors to liability for their otherwise immune charging decisions, would, of course, be quite onerous. As prosecutors' offices are frequently understaffed and confronted with a deluge of criminal activity, diverting their time, "energy and attention . . . from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, would harm the public interest in a most substantial way.

Respondent's suggestion would sweep far more broadly than providing recourse for the victim of a "deliberate or reckless falsehood." Opp. at 27. Denying prosecutors absolute immunity for seeking arrest warrants in conjunction with the filing of criminal charges would subject them to suit and the burden of discovery simply for making mistakes in evaluating or misreading police files. This is of no small moment as 27% of felony cases result in dismissal or acquittal, *see* Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 1992* 26 (Table 21) (1995), and "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler*, 424 U.S. at 425.

Prosecutors are not infallible. The criminal justice system, however, has established procedures to protect an accused against unwarranted intrusions. These include the *Gerstein* hearing to determine whether probable cause exists to restrain a suspect's liberty pending trial, *see Gerstein*, 420 U.S. at 119-22, and the preliminary hearing to determine whether probable cause exists to proceed to trial. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 1.4, at 23-24 (5th ed. 1984); *see also State v. Knapstad*, 107 Wash.2d 346 (1986). The "focus" of these pretrial procedures "should not be blurred by even the subconscious knowledge that a . . . decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Imbler*, 424 U.S. at 427; *cf. Pierson v. Ray*, 386 U.S. 547, 554 (1967) (a judge's "errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption").

Moreover, other mechanisms exist to protect against the potential abuse of prosecutorial powers in filing for arrest warrants. *Imbler*, 424 U.S. at 428-29. That prosecutors in Washington State attest to the veracity of the statements contained in a probable cause certification "under penalty of perjury," J.A. 20, is itself a shield against abuse. *See Imbler*, 424 U.S. at 429. In addition, state prosecutors are subject to criminal prosecution under federal law for "willful deprivations of constitutional rights." *Id.* (citing 18 U.S.C. § 242). Furthermore, as an attorney Kalina is subject to bar discipline for the violation of the rules of professional conduct. *See* Wash. Rules of Professional Conduct (1996). Indeed, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler*, 424 U.S. at 429 & n.30. As *Imbler* recognized, "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime." *Id.* at 429.

Beyond blurring the focus of pre-trial proceedings, subjecting prosecutors to suit for seeking an arrest warrant in conjunction with the filing of criminal charges will adversely affect criminal defendants in another way. If, as occurred here, a prosecutor's voluntary dismissal of a case will be greeted by a lawsuit, prosecutors will be less likely to admit their mistakes. Even where prosecutors' offices assign the responsibility for filing charges and trying cases to different attorneys, the latter will review case files cognizant of the consequences of a voluntary dismissal. Prosecutors' offices could be expected to divert their resources to bolster cases in order to protect their fellow employees from suit. While this use of scarce prosecutorial resources might ultimately produce enough evidence to convict, the diversion of resources could also harm the prosecution of other, more important cases. Furthermore, it would lead to the ironic result that innocent defendants will be subjected to the anxiety of a continuing prosecution which, if prosecutors had absolute immunity, would have been promptly dismissed. Denying prosecutors absolute immunity for this conduct thus ill serves innocent defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 25, 1997

(1)

No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE THIRTY-NINE COUNTIES OF THE STATE OF WASHINGTON* AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The State of Washington abandoned its mandatory grand jury practice some 80 years ago.[2] While grand juries are still convened on rare occasions in Washington[3], the vast majority of Washington prosecutions are instituted on information filed by the prosecutor. On many occasions the information is filed without a prior judicial determination of "probable cause". Washington's charging procedure, which is specifically authorized by the Washington Constitution[4], received this Court's approval in *Beck v. Washington*, 369 U.S. 541, 545 (1962).

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[1] Counsel for both petitioner and respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

[2] Washington Laws 1909, c. 87.

[3] Grand juries in Washington are convened only on special occasions and for specific purposes. Between 1917 and 1957, the most populous county in Washington, King County, had summoned a total of eight grand juries. *Beck v. Washington*, 369 U.S. 541, 545 (1962). These grand juries were utilized primarily to investigate corruption. The statute under which these eight grand juries were convened, Chapter 10.28 RCW, was repealed in 1971.

The new grand jury statute, Chapter 10.27 RCW, created a "special inquiry judge". The "special inquiry judge" performs many of the investigative functions of a grand jury. *See generally In re Special Inquiry Judge*, 899 P.2d 800 (Wash. App. 1995). Grand juries, therefore, have been used even less frequently in Washington than when this Court rendered its opinion in *Beck v. Washington, supra*.

[4] Wash. Const. art. 1, § 25 provides that:

> Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Thousands of criminal cases each year are initiated by information in the State of Washington by Prosecuting Attorneys and their deputies.[5] While a statute provides that the only document needed to initiate a criminal charge is an information[6], local court rules in two counties, including King County where the petitioner, Lynne Kalina, is employed, require the prosecutor to file an additional document.[7] This additional document is

---

[5] Both juvenile offender cases and criminal cases filed in the Washington superior courts are initiated by information. Washington Criminal Rule 2.1; RCW 13.40.070. In 1993, 29,765 criminal cases and 24,360 juvenile offender cases were filed in the superior courts of Washington. In 1994, 30,395 criminal cases and 25,883 juvenile offender cases were filed in the superior courts of Washington. In 1995, 33,965 criminal cases and 27,716 juvenile offender cases were filed in the superior courts of Washington. *See* Office of the Administrator for the Courts, *Caseloads of the Courts of Washington 1995*, at 38 (1996).

[6] RCW 10.37.010 provides that:

> No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

[7] King County LCrR 2.2 provides as follows:

> Warrant Upon Indictment Or Information
>
> (b) Issuance of Summons in Lieu of Warrant.
>
> (1) When Summons Must Issue. Absent a showing of cause for issuance of a warrant, a summons shall issue for a person who has been released by a magistrate on the preliminary appearance calendar. The person shall be directed to appear on the arraignment calendar one week after the date of his/her release.
>
> (g) Information to Be Supplied to the Court. *When a charge is filed in Superior Court and a warrant is requested, the Court shall be provided with the following information about the person charged:*
>
> (1) The pretrial release interview form, completed by either a bail interviewer or by the defense counsel.
>
> (2) *By the prosecuting attorney, insofar as possible.*
>
> *(A) A brief summary of the alleged facts of the charge;*
>
> (B) Information concerning other known pending or potential charges;
>
> (C) A summary of any known criminal record;
>
> (D) Any other facts deemed material to the issue of pretrial release.
>
> (3) Any ruling of a magistrate at a preliminary appearance.
>
> [Emphasis added.]

generally referred to in Washington practice as a "certificate of probable cause".

Thurston County LCrR 2.2, provides as follows:

> Warrant Upon Indictment Or Information
>
> (g) Information to be Supplied to the Court. *When a charge is filed in the Superior Court and an order for a warrant or a summons is requested, the court shall be provided with the following information about the person charged:*
>
> (1) The pretrial release interview form, if one has been completed by the Pretrial Services Unit.

The filing of the information, under Washington law, can trigger the start of Washington's court rule speedy trial period.[8] A failure to secure the presence of the defendant in court within 104 days of the filing of the information may result in the dismissal of charges with prejudice.[9] Both the Washington courts and the Washington legislature have placed the burden of securing the presence of the defendant in court upon the prosecutor.[10]

---

(2) *By the prosecuting attorney, insofar as possible:*

(A) A brief summary of the alleged facts of the charge;

(B) Information concerning other known pending or potential charges;

(C) A summary of any known criminal record;

(D) Any other facts deemed material to the issue of pretrial release.

(3) Any ruling of the court at a preliminary hearing or appearance.

[Emphasis added.]

Many Washington prosecuting attorneys in other counties file certifications of probable cause that contain the information required by the Thurston County and King County local rules because of the myriad uses courts make of the certifications of probable cause throughout the pre-trial, trial, and appeal portions of a criminal case. *See infra* at 5-7.

[8] *State v. Greenwood*, 845 P.2d 971 (Wash. 1993); *State v. Striker*, 557 P.2d 847 (Wash. 1976).

[9] *See generally, State v. Stewart*, 922 P.2d 1356, 1360 (Wash. 1996); *Greenwood*, 845 P.2d at 974; *Striker*, 557 P.2d at 852.

[10] RCW 36.27.020(6); *State v. Anderson*, 855 P.2d 671 (Wash. 1993); *State v. Greenwood, supra.*

In order to timely secure the defendant's presence for trial, the prosecuting attorney will often request a warrant of arrest.[11] Consistent with this Court's opinion in *Gerstein v. Pugh*, 420 U.S. 103 (1975), such a request must be accompanied by a certificate or statement of probable cause to support the charge. Under Washington law, the certificate of probable cause can consist solely of a summary of the contents of the police reports.[12]

The certificate of probable cause is utilized by the court and the prosecution for purposes other than obtaining a warrant of arrest. The facts contained in the certificate of probable cause are considered in determining the amount of bail or other conditions of pretrial release.[13] Facts contained in the certificate of probable cause are considered in determining whether a defendant had notice of all of the elements of an offense.[14]

---

[11] Prosecutors' attempts to satisfy the Washington speedy trial court rule by mailing letters to the defendants that advise them of the pending charges have had mixed success in the Washington courts. *See, e.g., State v. Marler*, 911 P.2d 420 (Wash. App.), *review denied*, 919 P.2d 601 (Wash. 1996); *State v. Bazan*, 904 P.2d 1167 (Wash. App. 1995), *review denied*, 919 P.2d 600 (Wash. 1996).

[12] Washington Criminal Rule 2.2(a); Washington Juvenile Court Rule 7.5(b).

[13] Washington Criminal Rule 3.2(a).

[14] *State v. Kjorsvik*, 812 P.2d 86 (Wash. 1991); *State v. Garcia*, 829 P.2d 241 (Wash. App.), *review denied*, 838 P.2d 1143 (Wash. 1992); *State v. Bryant*, 828 P.2d 1121 (Wash. App.), *review denied*, 833 P.2d 1389 (Wash. 1992).

The information contained in the certificate of probable cause can form the factual basis for a guilty plea.[15] The facts contained in the certificate of probable cause may be considered in deciding whether a defendant is entitled to a judgment of acquittal by reason of insanity.[16]

The facts in the certificate of probable cause are relied upon to establish whether a spouse is competent to testify against a defendant without the defendant's permission.[17] Information in a certificate of probable cause can establish whether a prior conviction is admissible for impeachment purposes under Washington Evidence Rule 609.[18] The material in a certificate of probable cause can be utilized by the court in determining a proper sentence.[19]

Facts contained in a certificate of probable cause can provide the background facts for Washington's appellate courts.[20] Information in a certificate of probable cause has

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[15] *See, e.g., State v. Saas*, 820 P.2d 505 (Wash. 1991); *State v. Arnold*, 914 P.2d 762, 765 (Wash. App.) ("The judge stated positively that he always reads and considers those certificates, and that he did so this time [when accepting a guilty plea]"), *review denied*, 925 P.2d 989 (Wash. 1996).

[16] *State v. Autrey*, 794 P.2d 81 (Wash. App.), *review denied*, 802 P.2d 127 (Wash. 1990).

[17] *State v. Thornton*, 835 P.2d 216 (Wash. 1992).

[18] *See, e.g., State v. Schroeder*, 834 P.2d 105 (Wash. App. 1992).

[19] *State v. Overvold*, 825 P.2d 729 (Wash. App. 1992); *State v. Cooper*, 816 P.2d 734 (Wash. App. 1991); *State v. Tindal*, 748 P.2d 695 (Wash. App. 1988).

[20] *See, e.g., State v. Herzog*, 771 P.2d 739 (Wash. 1989); *State v. Becker*, 801 P.2d 1015 (Wash. App. 1990).

been utilized by the Washington Supreme Court to determine which portion of an obscenity statute applied to a particular case.[21]

The Ninth Circuit's opinion in *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S. Ct. 1079 (1997), has stripped prosecutors of their absolute immunity for engaging in routine procedures under Washington law for initiating and pursuing criminal prosecutions. The Ninth Circuit's opinion, if left intact, will severely impact prosecutors' ability to vigorously and fearlessly perform their duty. The Ninth Circuit's ruling diverts scarce prosecutorial resources from the enforcement of criminal laws to the defense of civil lawsuits.

ARGUMENT

Public prosecutors must administer their offices with courage and independence. Both of these qualities are impeded when the prosecutor is made subject to suit by those whom s/he accuses and fails to convict. *Imbler v. Pachtman*, 424 U.S. 409, 423-24 (1976), quoting *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935). Accordingly, this Court has provided prosecutors with absolute immunity under § 1983 law suits for actions intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

The Ninth Circuit ignores the teachings of *Imbler* in its decision in *Fletcher v. Kalina, supra*. The Ninth Circuit,

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[21] *State v. Reece*, 757 P.2d 947 (Wash. 1988), *cert. denied*, 493 U.S. 812 (1989).

focusing on the issuance of the arrest warrant, instead of the purpose for the warrant and the warrant's relationship to the charging function, determined that prosecutors are only entitled to qualified immunity for any errors contained in the certificate of probable cause.[22] Other Circuits, which have focused on the purpose of a post-charging arrest warrant, have had little difficulty in finding that absolute immunity should be extended to prosecutors who request arrest warrants.[23]

The Ninth Circuit decision in *Fletcher v. Kalina*, assumes the sole purpose of the certificate of probable cause is to secure a warrant of arrest. Such is not the case. In Washington, the certificate of probable cause is intimately associated with the judicial process in other ways, as well.

Generally, the certificate of probable cause is the only document in the court file that outlines in detail the facts in every criminal prosecution. The certificate of probable cause is utilized by the courts during the entire judicial process, beginning with the filing of an information,

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[22] *Fletcher v. Kalina*, 93 F.3d at 655.

[23] *See Roberts v. Kling*, 104 F.3d 316 (10th Cir. 1997); *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983); *Pena v. Mattox*, 84 F.3d 894, 896 (7th Cir. 1996); *Pinaud v. Suffolk*, 52 F.3d 1139, 1150 (2d Cir. 1995); *Myers v. Morris*, 810 F.2d 1437, 1446 (8th Cir. 1987); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *cf. Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990) (prosecuting attorney entitled to absolute immunity for a seizure warrant in a civil case).

through sentencing and appeal. As such, the certificate of probable cause is prepared by the prosecutor in his or her role as an advocate and is within the continuum of initiating and presenting a criminal case. Prosecutors must enjoy absolute immunity for drafting, signing, and filing the certificates. By likening a warrant secured by a police officer to a prosecutor's certificate of probable cause, the Ninth Circuit erred.

The act of obtaining an arrest warrant after or in conjunction with the filing of the information is not an investigative function. The prosecutor, by filing the motion for warrant of arrest, is not seeking to obtain more information before deciding that the case should be prosecuted. Rather, the act of preparing a certificate of probable cause and the act of obtaining an arrest warrant in conjunction with the filing of a criminal information is functionally part of the initiation of a criminal proceeding. As the Tenth Circuit has stated:

> [W]e think that a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a

> prosecution would be futile.[24] Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of a prosecution" under *Imbler*.

Roberts v. Kling, 104 F.3d 316, 320 (10th Cir. 1997), citing *Lerwill v. Joslin*, 712 F.2d 435 (10th Cir. 1983).

While absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity, the fate of prosecutors with qualified immunity depends upon whether the government officials performing the discretionary function violated a clearly established statutory or constitutional right of which a reasonable person would have known.[25] A prosecutor who merely enjoys qualified immunity must answer in court each time a person charges him or her with wrongdoing. This diverts the prosecutor's energy and attention from the pressing duty of enforcing the criminal laws.[26] Moreover, as this Court noted in *Imbler*, suits that survive the pleadings would pose substantial danger of liability even to the honest prosecutor:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and

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[24] This point is particularly true in Washington as the Washington Supreme Court has interpreted the Washington Court Rules as absolutely prohibiting a trial from beginning unless the defendant is present. *State v. Jackson*, 878 P.2d 453 (Wash. 1994); *State v. Hammond*, 854 P.2d 637 (Wash. 1993).

[25] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[26] *Imbler*, 424 U.S. at 424.

> even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Imbler, 424 U.S. at 425-26.

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with strict and fair law enforcement. Washington prosecutors generally lack the resources for conducting their own investigations. They determine whether to file charges on the basis of investigations conducted by law enforcement agencies. The Ninth Circuit's opinion casts the legitimacy of this procedure into doubt. It suggests that prosecutors will be liable if they should have known that the facts reported by police are false. This requires them to conduct investigations of some indeterminate scope.

The Ninth Circuit's opinion has created great uncertainty about how prosecutors can balance their potential civil liability with their obligations to provide the court with summaries of the alleged facts of the charges under various local court rules or in connection with requests for conditions of release or arrest warrants. Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors wonder if they must now submit every police report and witness statement to the court in support of the charge in order to avoid a later lawsuit for the omission of an alleged material fact. Such a practice would have a dramatic impact upon courts, as judges must pore over

copious documents to seek out those facts that might support the filed charges. This practice could also impede the investigation and prosecution of related crimes or co-participants by prematurely releasing facts to the community at large. The alternative of having investigative police officers personally sign affidavits or declarations once a prosecutor determines that probable cause exists would only delay the initiation of charges and would interfere with the investigation of other crimes by unnecessarily removing officers from the streets.[27]

Following the Ninth Circuit opinion in *Fletcher v. Kalina*, prosecutors now wonder if a decision to rely upon police officers' reports in preparation of certificates of probable cause instead of personally re-interviewing witnesses will engender liability for failure to investigate. Prosecutors wonder if a decision to rely upon prosecutor prepared affidavits that summarize the evidence in support of a request for a post-charging warrant of arrest instead of requiring the complainant and other witnesses to appear personally before the judge for questioning will engender liability for omitting a fact that might later prove exculpatory.

---

[27] Washington law only requires a police report to be sworn under oath when the report is prepared in connection with an impaired driver's refusal to submit to a breath or blood test to determine the alcohol content of the impaired driver's breath or blood, *see* RCW 46.20.308(6), or when the police report are incorporated into a criminal citation or notice of civil traffic infraction, *see* Wash. Crim. Rule for Courts of Limited Jurisdiction 2.1(b)(5); RCW 46.63.090. None of these documents are used in the prosecution of felony charges.

Finally, prosecutors wonder whether resurrection of the grand jury system is the only way to avoid suits for damages from a defendant who resents being arrested to answer a charged crime.[28] Resurrection of the grand jury would, as noted by a recent legislative study, carry substantial cost[29] and would dramatically slow the processing of felony cases.

CONCLUSION

This Court should reverse the Ninth Circuit's decision in *Fletcher v. Kalina*, and provide Washington's prosecutors with the absolute immunity necessary for them to "[p]rosecute all criminal . . . actions in which the state . . . may be a party . . . "[30] and to "[i]nstitute and prosecute proceedings before magistrates for the arrest of

---

[28] The Federal Courts appear to agree that prosecutors are immune from § 1983 liability for their conduct before a grand jury. *See, e.g., Hill v. City of New York*, 45 F.3d 653, 661 (2nd Cir. 1995); *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 740 (1995).

[29] *See* Washington Senate Staff Memorandum, *Grand Juries* (May 15, 1996). A copy of the memorandum, minus attachments, is contained in appendix A.

[30] RCW 36.27.020(4).

persons charged with or reasonably suspected of felonies"[31] without apprehension of personal consequences.

Respectfully submitted this 23rd day of April, 1997.

Respectfully submitted,

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Prosecuting Attorney

PAMELA BETH LOGINSKY
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[31] RCW 36.27.020(6).

APPENDIX 1

(LOGO)

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Senator Adam Smith
Chair

Washington State Senate

Law and Justice Committee

MEMORANDUM

Date: May 15, 1996

From: Cynthia Runger, staff counsel

To: Senator Roach

Subject: Grand Juries

You requested the following information on grand juries:

1) Are grand juries established by the constitution in this state? 2) How often have they been summoned? 3) How assessable are grand juries to the general public? 4) How much do grand juries cost? 5) How have grand juries been used in this state? and 6) How do grand juries work in other states. Below are responses to your inquiries.

ARE GRAND JURIES ESTABLISHED BY THE CONSTITUTION IN THIS STATE?

Yes. The Constitution of the State of Washington authorizes offenses to be prosecuted either by grand jury

indictment or by information (see Washington State Constitution Article 1 § 25 and Article 1 § 26 (copies attached)).

HOW OFTEN HAVE GRAND JURIES BEEN USED IN THIS STATE?

I have inquired at several county prosecutors offices, the Office of the Administrators for the Courts, and other legal organizations. I have not been able to obtain a specific quantitative response, however, I have been told that grand juries have not been used often in this state. It appears that the general consensus among prosecutors is that: 1) grand juries are time consuming, costly, and require additional personnel that many offices do not have; 2) they add an unnecessary layer to the already bogged-down court system; and 3) finding jurors for grand juries would be an unduly burdensome task since counties already have difficulty getting jurors to respond to short jury terms.

HOW ASSESSABLE ARE GRAND JURIES TO THE GENERAL PUBLIC IN THIS STATE?

The statutory provision governing grand juries is set forth in RCW 10.27.030. In Washington grand juries may be summoned by a majority of a county's superior court judges if the public interest so demands. The court may summon a grand jury on it's own if there is sufficient evidence of criminal activity or corruption or upon a petition to the court by a public attorney. There is no mechanism for direct public access to the court for summoning a grand jury. Conceivably, a citizen could provide

a court with sufficient evidence of criminal activity or corruption, thereby convincing a court that the public interest so demands that a grand jury be summoned, but there is no explicit statutory authority for this type of action. Nebraska and Oklahoma are two states that allow qualified electors to petition the court for a grand jury (see attached chart entitled, "A Comparison Chart of Grand Juries in 10 States").

HOW MUCH DO GRAND JURIES COST?

This answer is difficult to ascertain in definitive quantitative terms because costs of grand juries vary with each case. Numerous factors must be considered in determining the cost of a grand jury. By statute a grand jury consists of twelve persons who are authorized to sit a term of no more than 60 days. A more complex case may have a considerable cost because of factors such as lengthier investigations, court costs and attorneys fees.

HOW HAVE GRAND JURIES BEEN USED IN THIS STATE?

Below are examples of grand jury cases in this state.

State v. Ingeles (1940). A grand jury was summoned to investigate accounting matters for funds contributed toward the political campaign of a gubernatorial candidate in 1936.

State v. Bell (1962). A grand jury was impaneled August 25, 1958, and proceeded to investigate certain alleged criminal activities arising in connection with the construction of the Priest Rapids Dam on the Columbia River

by Public Utility District No. 2 of Grant County (PUD). There had been rumors of substantial gratuities and payments of money made by the prime contractor to officers of the PUD.

State v. Twitchell (1963). In January 1960, a grand jury convened in Snohomish County to investigate a Snohomish County Sheriff who allegedly wilfully neglected his duty in that he knowingly, without making a complaint and without making an arrest, permitted the keeping of a house of prostitution and the practice of prostitution within the county.

State v. Robinson (1973). A King County grand jury was convened to investigate a Seattle police officer for allegedly soliciting and receiving bribes.

State v. Carroll (1973). In 1971 a grand jury was convened in King County for the purpose of investigating possible bribery and corruption among police and public officials.

State v. Sponburgh (1974). In 1971, a King County grand jury was convene to investigate members of the Washington State Liquor Control Board in connection with liquor administered by the liquor board.

State v. Torgenson (1978). A grand jury was convened to investigate whether a county commissioner engaged in conspiring with a supervisor of a county road district and his assistant to use county labor and materials for his own benefit and failing to investigate and act to protect government assets even after receiving a report that the same road supervisor and his assistant had stolen county property.

HOW DO GRAND JURIES WORK IN OTHER STATES?

Please see attached chart entitled, "A Comparison Chart of Grand Juries in 10 States."

No. 96-792

In The

Supreme Court of the United States

October Term, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE GOVERNMENT OF GUAM, AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Should a prosecutor be subject to civil liability for matters contained in an affidavit that she filed in court as part of the initiation of a prosecution, in light of the common-law immunity for alleged defamation in court proceedings and in light of the critical policy need to insulate key actors in the judicial process from the distorting effect of potential personal liability?

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BRIEF OF THE STATES OF MARYLAND, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, OREGON, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, THE GOVERNMENT OF GUAM AND THE TERRITORY OF THE VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of petitioner.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The outcome of this case will have a significant impact on the amici States' ability to ensure that their criminal prosecutors are not hindered in the vigorous enforcement of the criminal laws. All of the concerns that underlay this Court's recognition of prosecutorial immunity in *Imbler v. Pachtman*, 424 U.S. 409 (1976)--the importance of independent prosecutorial judgment unfettered by concerns for personal liability; the high potential for harassing and vengeful litigation; the diversion of resources and time needed to defend such actions--are self-evidently concerns of the States, which of course have primary responsibility for the enforcement of the criminal law and protection of their citizens.

A secondary, but no less real, concern is the impact that this decision could have on the capacity of States and their Attorneys General's offices to manage the explosion of civil litigation that could result from theoretically permitting any acquitted, nol prossed, or otherwise unconvicted criminal defendant from stating a claim for prosecutorial liability. If the Court were to affirm the decision of the Ninth Circuit, the workable concept of *Imbler*--protection of prosecutorial functions "intimately associated with the judicial phase of the criminal process," *id.* at 430--would be left in shambles, and prosecutors would be at a loss to know which, if any, of their functions other than the act of filing charges and the actual trial of the criminal case are immunized. Thus, the States have an interest in urging the Court to take the opportunity that this case presents to affirm that, at a minimum, those prosecutorial acts that occur in connection with and after the filing of charges are virtually always associated with the judicial phase of the criminal process and should therefore be absolutely immune, except in the extraordinary case.

STATEMENT OF THE CASE

The Respondent, Rodney Fletcher, filed this damages action under 42 U.S.C. § 1983 against Petitioner, Lynne Kalina, a Deputy Prosecuting Attorney for King County, Washington,

alleging violations of his Fourth and Fourteenth Amendment rights under the United States Constitution. The essence of Fletcher's complaint was that Kalina had filed an affidavit in support of an arrest warrant that contained facts that Kalina knew or should have known to be false. *See Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996).

The facts as alleged in the complaint are that in November 1992, the Seattle Police Department referred to the King County Prosecuting Attorney's Office a completed investigation report relating to the burglary of a school. Kalina, acting as a Deputy Prosecuting Attorney, reviewed the report and determined that charges should be filed against Fletcher. Pursuant to Washington State criminal procedure, Kalina prepared three pleadings to initiate the prosecution: 1.) an Information charging Fletcher with burglary in the second-degree; 2.) a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of a Warrant and Fixing Bail, and 3.) a Certificate for Determination of Probable Cause, which she personally signed. Kalina prepared the Certificate for Determination of Probable Cause by summarizing the evidence in the completed investigation report. It alleged that Fletcher's fingerprints were found at the crime scene but that he had never been associated with the school. The Certificate also stated that an eyewitness had identified Fletcher as the person who had attempted to sell the property stolen from the school.

Based on these pleadings, the King County Superior Court on December 14, 1992, found probable cause and issued a warrant for Fletcher's arrest. Fletcher was arrested on September 24, 1993, and several weeks later, the prosecutor's office learned that in fact Fletcher had once been an employee at the school where the burglary occurred and that the eyewitness identification had not in fact occurred. Based on this new information, the prosecuting attorney moved to dismiss the charges, and the court granted the motion.

Subsequently, Fletcher filed this action in federal district court. Kalina moved for summary judgment on grounds of absolute immunity. The court denied the motion, and Kalina

filed an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit. That court affirmed the denial of summary judgment, *see Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996), reasoning that Kalina's actions in signing the certificate in support of the arrest warrant were indistinguishable from the actions of the police officer in *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (police officer does not have absolute immunity from a claim that he secured an arrest warrant without probable cause), and that therefore only the qualified immunity available to police officers should apply to Fletcher's claim.

SUMMARY OF ARGUMENT

This case presents an opportunity for the Court to draw clear lines regarding the scope of prosecutorial immunity that are consistent both with the Court's precedents in this context and with the traditional common-law immunities that served as the basis for those decisions. First, the Court should reaffirm what should by now have been apparent: that the common-law defamation privilege justifies an absolute immunity from liability for a prosecutor's presentation of matters to a court in any form, whether by affidavit, as in this case, or by participation in a probable cause hearing, as in *Burns v. Reed*, 500 U.S. 478 (1991). Indeed, this case presents even stronger reasons for recognizing absolute immunity than did *Burns* because the affidavit here was presented to the court at the time of and in connection with the initiation of the prosecution. Second, the Court should clarify for lower courts, prosecutors, and Attorneys General (who often defend claims against prosecutors) that, with rare exceptions, all prosecutorial conduct occurring in connection with and after the initiation of prosecution--i.e., in the "judicial phase" of criminal proceedings--is absolutely immune, except in the unusual case, such as in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), where the conduct has no relation to the presentation of the State's case. Once formal criminal proceedings have begun, it will usually be less difficult to ascertain when a prosecutor is performing a nonprosecutorial function than it might be to make that

determination pre-indictment.

ARGUMENT

I. THE ALLEGEDLY FALSE STATEMENTS CONTAINED IN THE AFFIDAVIT FILED WITH THE COURT ARE SHIELDED BY ABSOLUTE IMMUNITY BECAUSE THEY ARE COVERED BY THE COMMON-LAW DEFAMATION PRIVILEGE FOR STATEMENTS MADE IN JUDICIAL PROCEEDINGS

Just as *Buckley* was "an easy case," *id.* at 2619 (Scalia, J., concurring), for denying absolute prosecutorial immunity because of, among other things, the complete absence of an analogous common-law privilege for acts like fabricating evidence or making out-of-court statements, this case should be an easy one for recognizing absolute immunity: here, the act giving rise to the claim is the statement of allegedly malicious falsehoods in a document presented to a court, conduct that falls squarely within the traditional common-law immunity for allegedly defamatory remarks made by a prosecutor in connection with a judicial proceeding. *See Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment) ("Public prosecutors were . . . absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding, and this immunity was also based on the policy of protecting the judicial process.")(citations omitted).

The Court has unequivocally held that this common-law defamation privilege serves as the foundation for absolute prosecutorial immunity against "making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses." *Burns*, 500 U.S. at 489-490 (citations omitted); *see also Buckley*, 113 S. Ct. 2614, 2617; *id.* at 2620 (Scalia, J., concurring)("Insofar as [the false-evidence claims] are based on [the prosecutor's] supposed knowing *use* of fabricated evidence before the grand jury and at

trial--acts which might state a claim for denial of due process--the traditional defamation privilege provides complete protection from suit under § 1983.").

As Justice Scalia explained in his *Burns* concurrence, the common law in existence at the time of the 1871 enactment of the Civil Rights Act afforded an absolute privilege against defamation suits to all statements made during the course of judicial proceedings. *Burns*, 500 U.S. at 501 (Scalia, J., concurring). This privilege extended both to witnesses making the allegedly defamatory statements, thus forming the basis for the absolute witness immunity affirmed in *Briscoe v. LaHue*, 460 U.S. 325 (1983), and to attorneys presenting such evidence. *Burns*, 500 U.S. at 501 (Scalia, J., concurring).

Applying this defamation privilege in *Burns*, the Court was unanimous in granting absolute immunity to a prosecutor's act of eliciting allegedly misleading testimony from a police officer at a hearing on probable cause to issue a search warrant. The Court reasoned that, at common law, prosecutors enjoyed the same absolute immunity as witnesses for statements "related to" a judicial proceeding. *Burns*, 500 U.S. at 489-90; *see also id.* at 490 n.6 (noting widespread recognition in the lower courts and at common law that prosecutors had absolute immunity for presentation of matters to a grand jury).

The application of the defamation privilege to find absolute immunity on the facts of the instant case is just as "easy" as it was in *Burns*. The allegedly false statements that Kalina made were contained in a Certificate for Determination of Probable Cause that was *filed with the court*. It should be beyond question, then, that these allegedly actionable remarks were "made during and relevant to a judicial proceeding." *Imbler*, 424 U.S. at 439 (White, J., concurring in the judgment). Put another way, the statements were "subjected to the 'crucible of judicial process,'" *Burns*, 500 U.S. at 496 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in judgment)), and thus inherently safeguarded against the potential for unchecked prosecutorial misconduct. *Butz v. Economou*, 438 U.S. 478, 512 (1978)("[T]he safeguards built into the judicial system tend to

reduce the need for private damages actions as a means of controlling unconstitutional conduct.").

Burns cannot be distinguished on the ground that the prosecutor merely elicited, rather than gave, false testimony, as might be argued here. First, the witness privilege which grounds prosecutorial absolute immunity in this context does not permit such a distinction. Second, the question presented in *Burns*, and the one on which the Court found absolute immunity, involved a charge that the prosecutor "intentionally fail[ed] to fully inform the court" of essential facts, 500 U.S. at 489 (quoting from Petition for Certiorari in that case), in the course of exercising the his prosecutorial "sole and exclusive power to seek a search warrant or approve the seeking of a search warrant." 500 U.S. at 491 n.7. In other words, in *Burns*, the prosecutor was making representations to the court just as Kalina was when she certified facts in a completed written investigation.

To summarize, this Court's interpretive approach to absolute immunity, which has looked to the scope of the common-law immunities that the Congress enacting the Civil Rights Act of 1871 would presumably have been aware of, compels the conclusion that a prosecutor has absolute immunity for matters presented to a court. Policy concerns also lead to this conclusion, as discussed below.

II. CONCERNS FOR PROTECTING THE INTEGRITY OF THE JUDICIAL PROCESS WEIGH IN FAVOR OF ABSOLUTE IMMUNITY BECAUSE THE FILING OF THE AFFIDAVIT OCCURRED SIMULTANEOUSLY WITH AND AS A PART OF THE FILING OF CRIMINAL CHARGES

In addition to the close analogy of common-law defamation immunity, the *Burns* Court held that the "policy of protecting the judicial process," 500 U.S. at 492, which was central to *Imbler*, dictated a rule of absolute immunity for the prosecutor's

presentation of evidence to the court in the hearing on the search warrant. Despite the fact that the criminal defendant in *Burns* was not charged with a crime until well after the probable cause hearing and search, the Court nonetheless considered the eliciting of allegedly false testimony at that hearing to be "intimately associated with the judicial phase of the criminal process." *Id.* (quoting *Imbler*). Similarly, the lack of any effect on the integrity of the judicial process underlay the Court's decision not to grant absolute immunity to the prosecutor's legal advice, which was given to the police in the midst of an ongoing investigation. *Id.* at 494 ("Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.")(citations omitted)(emphasis in original). In providing advice on the legality of using hypnosis as an investigative technique, the prosecutor was both far removed from the courtroom, and therefore unrestrained by concern that his act would be "subjected to the 'crucible of judicial process,'" *Burns*, 500 U.S. at 496 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in judgment)), and was acting in an administrative or investigative capacity at a phase of the case remote from a decision to charge or judicial proceedings. *Burns*, 500 U.S. at 493.

The consistent policy embodied in *Imbler*, *Burns*, and *Buckley* has been to protect the judicial process from the dysfunction and distortion that would result from key actors--witnesses and prosecutors--fearing for their personal liability. This policy has led the Court to protect prosecutors when acting 1.) before the bar of the court, where the prosecutor invariably appears as an advocate for the State, even if appearing during the investigative phase of the case, as in probable cause hearings or grand jury proceedings; or 2.) after the investigation is completed and the prosecutor's acts are advancing the ultimate goal of securing a prosecution; or 3.) both of the above. The facts in this case fall into category 3.), where both conditions are present. First, Kalina filed her Certificate for Determination of

Probable Cause *with the court* at the same time and in the same "package" of pleadings containing the Information charging Respondent with a criminal offense. Second, she prepared her Certificate for Determination of Probable Cause based on *a completed written investigation report*. There is nothing to support any inference that her acts occurred during the investigation. The certification she signed and filed could hardly be more intimately associated with the judicial process, as that concept has been applied in the Court's cases.

III. ABSENT EXTRAORDINARY CIRCUMSTANCES, PROSECUTORIAL CONDUCT OCCURRING AT THE TIME OF OR AFTER THE FILING OF CRIMINAL CHARGES IS A PROSECUTORIAL FUNCTION AND ABSOLUTELY IMMUNE

The Ninth Circuit's misreading of this Court's precedents points to a larger problem, which the Court now has an auspicious occasion to remedy: the Court's absolute immunity cases, while embodying sound and workable principles, have lent themselves to unprincipled *ad hoc* narrowing by the lower courts. Any test without greater certainty of application significantly frustrates the aims of ensuring prosecutors the independence of judgment and freedom from diverting, vexatious litigation that *Imbler* understood to be so essential.

The nation's judicial systems would be well served by a ruling that firmly established absolute prosecutorial immunity for virtually all conduct in connection with a criminal case that occurs as part of or after the filing of criminal charges. Once charges have been filed, the prosecutor, acting as a prosecutor, has the singular mission of proving the charges and securing a conviction, unless justice dictates changing course. That being so, it should generally be easier to identify and check, once the judicial proceedings are underway, instances when a prosecutor departs altogether from the prosecutorial function. For example, in *Buckley*, the Court readily concluded that the prosecutor's extrajudicial comments to the media in a press conference had

"no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 113 S. Ct. at 2618.

A holding that presumed absolute prosecutorial immunity for conduct during and following the filing of criminal charges would provide a helpful temporal demarcation similar to the one apparently established in *Buckley*, where the Court suggested that conduct occurring before probable cause exists can never be a prosecutorial function. *See Buckley*, 113 S.Ct. at 2616 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested"); *but see id.* at 2622-23 (Kennedy, J., dissenting) (noting anomalies created by drawing such an fixed line against the availability of absolute immunity). Just as the times when a prosecutor acts as an advocate before having probable cause to arrest may be rare or nonexistent, it would be the similarly rare case when, post-indictment, a prosecutor acts towards the indicted criminal defendant in ways that do not relate to the prosecutorial function. Such extra-judicial prosecutorial acts, such as the out-of-court statements in *Buckley*, are easily avoided by prosecutors or, if not, identified by courts as not deserving of absolute immunity.

CONCLUSION

For the foregoing reasons, as well as those stated in the Brief of the Petitioner and her other supporting *amici*, this Court should recognize the Petitioner's absolute immunity from the claim in this case and reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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No. 96-792

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v.

RODNEY FLETCHER,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS IN THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE*, NATIONAL DISTRICT ATTORNEYS' ASSOCIATION AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE PETITIONER

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QUESTION PRESENTED

Whether a prosecutor is entitled to absolute immunity for conduct in the function of obtaining an arrest warrant?

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IN THE
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BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF THE PETITIONER

STATEMENT OF THE INTEREST*

The National District Attorneys Association is an organization comprised of District Attorneys, Prosecuting Attorneys, deputy and assistant prosecutors from all fifty states who practice in both the criminal and civil fields. The California District Attorneys Association consists of the District Attorneys of the State of California, city attorneys, city prosecutors, the California Attorney General, and assistant, local, and state prosecutors.

Upon review of the instant matter, these associations have concluded that the outcome of this case will have a profound impact upon the prosecutors' role in the arrest warrant process.

---

* Counsel for both petitioner and respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

SUMMARY OF ARGUMENT

This Court has adopted a functional analysis in determining prosecutorial absolute immunity. A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman* 424 U.S. 409, 430, (1976). The focus is therefore on the prosecutorial function, not prosecutorial acts or conduct, in determining the scope of immunity.

A prosecutor is absolutely immune when functioning as an advocate in respect to judicial proceedings. *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 430; *Malley* v. *Briggs* 475 U.S. 335, 342 (1986); *Burns* v. *Reed* 500 U.S. 478, 486 (1991); *Buckley* v. *Fitzsimmons* 509 U.S. 259, 269-270, (1993). This function, while judicially related, is not limited to the courtroom setting. *Burns* v. *Reed*, *supra*, 500 U.S. at 486; *Buckley* v. *Fitzsimmons*, *supra*, 509 U.S. 269-270.

A prosecutor's function in preparing an affidavit for an arrest warrant, and advocating the warrant's issuance, is intimately related to the judicial phase of the criminal process and therefore is to be given absolute immunity.

It is critical to the interests of both society and the accused, by prosecutors independently reviewing, preparing and advocating for the issuance of arrest warrants, that prosecutors be granted absolute immunity while functioning in the arrest warrant process. The prosecutor, charged with seeking justice, *Berger* v. *United States* 295 U.S. 78, 88 (1935), protects both society and the accused by review, preparation, and advocacy of application for warrants of arrest.

ARGUMENT

I

PROSECUTORIAL CONDUCT IN REVIEWING REQUESTS FOR ARREST WARRANTS, PREPARING AFFIDAVITS IN RESPECT THERETO, AND ADVOCATING ISSUANCE OF ARREST WARRANTS IS A FUNCTION INTIMATELY ASSOCIATED WITH THE JUDICIAL PHASE OF THE CRIMINAL PROCESS WHICH MUST BE ACCORDED ABSOLUTE IMMUNITY

Twenty years ago, this Court addressed the issue of prosecutorial immunity. *Imbler v. Pachtman*, *supra*, 424 U.S. at 430. This Court adopted a functional test: A prosecutor will be absolutely immune for prosecutorial functions "intimately associated with the judicial phase of the criminal process." *Ibid.*

This Court, in 42 U.S.C. §1983 suits, rejected the lesser protection of qualified immunity which "would undermine performance of [the prosecutor's] duties no less than would the threat of common-law suits for malicious prosecution." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 424.

The *Imbler* opinion concluded that a prosecutor will be accorded absolute immunity when initiating a prosecution and presenting the State's case. *Id.* at 431.

In 1986, this Court decided *Malley* v. *Briggs*, *supra*, 475 U.S. 335.[1] At issue, was whether a police officer is to be

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[1] The Ninth Circuit Court of Appeals decision in *Fletcher* v. *Kalina* 93 F.3d 653, 654, (9th Cir. 1996), bases its holding on *Malley*. *Id.* at 654.

The Eighth Circuit Court of Appeals decision of *Kohl* v. *Casson* 5 F.3d 1141 (8th Cir. 1993), states:

granted absolute immunity for presenting to a judge felony

> We conclude from *Burns* and *Malley* that a prosecutor is absolutely immune for appearing before a judicial officer to present evidence in support of an application for an arrest warrant, insofar as he acts as the state's advocate in presenting evidence and arguing the law.

*Id.*at 1146.

However, relying on *Malley*, the *Kohl* opinion also states that a prosecutor is entitled to only qualified immunity when vouching for the truth of the affidavits presented to a judicial officer. *Ibid.* It is submitted the analysis of *Malley* by the courts in *Fletcher* and *Kohl* is misdirected because the focus must be not on act but function.

The recent opinion of the Tenth Circuit Court of Appeals in *Roberts* v. *Kling* 104 F.3d 316 (10th Cir. 1997), provides for absolute prosecutorial immunity for a District Attorney's office investigator who prepared a "Statement of Facts" and sought an arrest warrant following a determination of probable cause within the District Attorney's office. *Id.* at 322. That opinion focuses not on acts but function:

> We are mindful of case law reasoning that different actors performing the same acts should receive the same level of immunity. *See, e.g. Fletcher,* 93 F.3d at 655-56. Nonetheless, we think that the proper focus is on the function an act serves, not the act itself. Further, we think Supreme Court authority supports this analysis.

Id. at 321.

The various jurisdictions throughout the United States have differing procedural requirements in application and advocacy for arrest warrants. Therefore, depending upon the jurisdiction, prosecutorial acts and conduct in the arrest warrant process will differ. However it is submitted that the prosecutorial function in all jurisdictions will be the same.

complaints and unsigned warrants for arrest. *Id.* at 339. The police officer urged this Court to compare his conduct to that of the prosecutor who initiates an indictment. *Id.* at 341-342. This court declined. It used a functional analysis:

> Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[fn. omitted]

*Id.*at 343.[2]

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[2] Relying on *Imbler*, the *Malley* opinion reiterates another distinction made between prosecutor and police: A prosecutor is subject to professional discipline:

> The organized bar's development and enforcement of professional standards for prosecutors also lessen the danger that absolute immunity will become a shield for prosecutorial misconduct. As we observed in *Imbler*, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." 424 US at 429, 96 S. Ct. 984 (footnote omitted). The absence of a comparably well-developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer.

Malley v. *Briggs*, *supra*, 475 U.S. at 343, fn. 5.

In addition to professional discipline, a prosecutor involved in a judicial proceeding based on the application for an arrest warrant is subject to judicial sanction, administrative

In 1991, this Court decided *Burns* v. *Reed*, *supra*, 500 U.S. 478, and held that prosecutors are absolutely immune for their conduct in their appearance and presentation of evidence at a probable cause hearing advocating the issuance of a search warrant. *Id.* at 491-92. The analysis is again functional:

> [S]ince the issuance of a search warrant is unquestionably a judicial act, [Citation omitted], appearing at a probable - cause hearing is "intimately associated with the judicial phase of the criminal process." [Citation omitted]. It is also connected with the initiation and conduct of a prosecution, particularly where the hearing occurs after arrest, as was the case here. *Id.* at 492.

The issuance of a warrant for arrest is most often more closely connected with the initiation and conduct of a prosecution than the issuance of a search warrant.[3]

Whether a prosecutor presents evidence through live witnesses at an application for search warrant, as occurred in

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discipline, and, in the case of chief prosecutors, accountability to the electorate.

Absolute immunity should be the standard "not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley*, *supra*, 475 U.S. at 342.

[3] The *Burns* opinion states that in the probable cause hearing "[t]he safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Burns v. Reed*, *supra*, 500 U.S. at 492; See also *Joseph* v. *Patterson* 795 F.2d 549, 556 (6th Cir. 1986).

It is submitted the same rationale of judicial safeguards applies with respect to the application for an arrest warrant.

Burns, or advocates to a court the issuance of an arrest warrant through affidavits summarizing evidence as occurred in the case at bar, is a distinction without difference. Both involve the advocacy function, are intimately associated with the judicial process, and are subject to safeguards built into the judicial system.[4]

In 1993, this court decided *Buckley* v. *Fitzsimmons*, *supra*, 500 U.S. 259, and refused to limit absolute immunity for prosecutors to the courtroom setting:

> This extreme position [of Petitioner] is plainly foreclosed by our opinion in *Imbler* itself. We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom" and are nonetheless entitled to absolute immunity.

Id. at 272.

Thus, over the past twenty years, this Court has reaffirmed that it is the function, not the acts or conduct of the prosecutor, which governs the application of absolute immunity. Prosecutorial participation in judicial proceedings is

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[4] Respondent would draw a distinction between preparing and signing the Information and preparing the affidavit urging issuance of the arrest warrant, which Respondent characterizes as "acting as a complaining witness on the declaration to establish probable cause." Respondent's Brief in Opposition, pp.7-8. In attempting to draw this distinction, Respondent confuses the prosecutor's acts with the function the acts serve. In both instances, the prosecutor's function is that of an advocate. The prosecutor is not a witness. The prosecutorial function in both seeking an indictment and in seeking an arrest warrant is intimately associated with the judicial process. In both instances the prosecutor is entitled to absolute immunity.

functionally entitled to absolute immunity, *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 430; *Malley* v. *Briggs*, *supra*, 475 U.S. at 342; *Burns* v. *Reed*, *supra*, 500 U.S. at 478, 486; *Buckley* v. *Fitzsimmons*, *supra*, 509 U.S. at 269-270, and is not limited to the courtroom setting. *Burns* v. *Reed*, *supra*, 500 U.S. at 486; *Buckley* v. *Fitzsimmons*, *supra*, 509 U.S. at 269-270. It is submitted that the prosecutorial function in preparation of affidavits in support of an arrest warrant, application, and advocacy of the warrant's issuance fit within parameters established by this Court which grant absolute immunity.[5]

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[5] Petitioner's conduct in preparing and presenting the arrest warrant illustrates why this function is entitled to absolute immunity. Petitioner prepared and filed an application for arrest warrant which advocated that a judicial order of arrest issue. That "MOTION AND ORDER DETERMINING THE EXISTENCE OF PROBABLE CAUSE, DIRECTING ISSUANCE OF WARRANT AND FIXING BAIL" states:

> The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for the arrest of the defendant....

Petition for A Writ of Certiorari, Appendix, Exhibit B, pg. 13a.

By and through this document, Petitioner advocated to the court the issuance of an arrest warrant. Petitioner's functional conduct was "intimately associated with the judicial phase of the criminal process", *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 430. It is entitled to absolute immunity.

II

IT IS CRITICAL TO THE INTERESTS OF BOTH SOCIETY AND THE ACCUSED THAT PROSECUTORS BE ACCORDED ABSOLUTE IMMUNITY WHEN PARTICIPATING IN THE ARREST WARRANT PROCESS

It is in the interest of both society and the accused that prosecutors have independence of judgement, unhampered by threat of lawsuit, in the review, preparation, and advocacy of issuance of arrest warrants. The prosecutorial function in this process is to evaluate, reject, draft, and advocate the legal and factual sufficiency of applications to the judiciary for warrants of arrest. The independant prosecutorial review, preparation, and decision whether or not to advocate the issuance of an arrest warrant protects as much the person subject to arrest as it does the interests of society. That function must be protected by absolute, not qualified, immunity:

> It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards for qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could endanger colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. [Citation omitted.]

Imbler v. *Pachtman*, *supra*, 424 U.S. at 425-426.

Today, there are about 2,350 state and local prosecutors' offices in the United States. U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prosecutors in State Courts, 1994*, at 1 (October,

1996). Some are in large metropolitan areas with full time prosecutors, but about a third of the prosecution offices throughout the country have only a part time prosecutor. *Ibid.* The pressures and demands on prosecutors have not diminished over the years since this Court addressed the issue of prosecutorial immunity in *Imbler* v. *Pachtman*. It is critical that absolute immunity be insured in prosecutorial participation in application for warrants of arrest.

CONCLUSION

For the reasons stated above, amicus urges this Court to grant prosecutors absolute immunity for their acts and conduct in obtaining arrest warrants, and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted
on behalf of the
National District Attorneys Association
and the California District Attorneys Association

GIL GARCETTI
District Attorney
County of Los Angeles

GEORGE M. PALMER
Head Deputy, Appellate Division

By

RODERICK W. LEONARD,
Deputy District Attorney
Professional Responsibility Unit
Counsel of Record

Attorneys for *Amicus Curiae*

DECLARATION OF SERVICE BY MAIL

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County with offices at 849 S. Broadway, 11th Floor, Los Angeles, California 90014-3268. On the date of execution hereof I served the attached document by depositing three true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed to the following:

JOHN W. COBB
Sr. Deputy Prosecuting Attorney
King County Prosecuting Attorney's Ofice
4800 Columbia Center
701 5th Street
Seattle, Washington 98104

TIMOTHY K. FORD, ESQ.
MacDonald, Hoague & Bayless
Hoge Building, 15th Floor
705 2nd Avenue
Seattle, WA 98104

CLERK
U. S. Ninth Circuit Court of Appeals
121 Spear St.
San Francisco, CA 94105

Executed on April 22, 1997, at Los Angeles, California.

RODERICK W. LEONARD
Deputy District Attorney
Professional Responsibility Unit
Los Angeles District Attorney's Office
Member of the Bar of the
United States Supreme Court

COPY

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON
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MAR 27

March 24, 1997,

Roderick W. Leonard
Professional Responsibilities Unit
Los Angeles County District Attorney's Office
849 South Broadway
11th Floor
Los Angeles, CA 90014

Re: Kalina v. Fletcher, U.S. S.Ct. No 96-792

Dear Mr. Leonard:

The Petitioner in this case, Lynne Kalina, hereby consents to the filing by the National District Attorney's Association and California District Attorney's Association, together, of an amicus brief in the above-referenced case before the Supreme Court of the United States.

Sincerely,

For NORM MALENG, King County Prosecuting Attorney

John W. Cobb

John W. Cobb
Senior Deputy Prosecuting Attorney

MACDONALD, HOAGUE & BAYLESS
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March 17, 1997

Roderick W. Leonard
Los Angeles County District Attorney's Office
849 South Broadway, 11th Floor
Los Angeles, CA 90014

Re: Kalina v. Fletcher, U.S. S.Ct. No. 96-792

Dear Mr. Leonard:

The Respondent in this case, Rodney Fletcher, hereby consents to the filing by the National District Attorney's Association and California District Attorney's Association, together, of an amicus brief in the above-entitled case before the Supreme Court of the United States.

Sincerely,

MacDONALD, HOAGUE & BAYLESS

Timothy K. Ford

TKF/lt

cc: John Cobb
Brady Johnson
Rodney Fletcher